UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,	)	
Plaintiff,	)	
vs.	)	Case No. 87-C-243-B
RICHARD POWELL and THELMA POWELL, husband and wife,	)	
Defendants.	)	

AGREED JOURNAL ENTRY OF JUDGMENT

NOW on this 15th day of September, 1987, this cause comes before the Court for hearing on Plaintiff's Motion for Summary Judgment, the Plaintiff, Federal Deposit Insurance Corporation in its corporate capacity ("FDIC"), appearing by and through its attorneys of record, Boesche, McDermott & Eskridge, and the Defendants, Richard and Thelma Powell (the "Powells"), appearing by and through their attorney of record, Bill Wilson. It appears to the Court that this is a suit upon two guaranty agreements; one executed by Richard Powell on July 21, 1983, and the other executed by Thelma Powell on the same date. It further appears to the Court that the Powells failed to respond to FDIC's Motion for Summary Judgment in this action when the same was due, and instead, the Powells have agreed to have judgment taken against them in this proceeding.

The Court after examining the pleadings, process, filings, and documents offered by Plaintiff in this cause, and being fully

advised in the premises, finds that personal service of summons was made upon the Defendants, by private process server, and that said summons and service was legal and regular in all respects.

The Court further finds that this action was originally commenced on July 11, 1986, by First National Bank of Sapulpa in the District Court in and for Creek County, State of Oklahoma, and was styled First National Bank of Sapulpa, Plaintiff vs. Richard Powell and Thelma Powell, husband and wife, Defendants, Case No. C-86-425. On March 5, 1987, the United States Comptroller of Currency declared First National Bank of Sapulpa insolvent and appointed the FDIC as Receiver. The FDIC later acquired the two guaranty agreements in its corporate capacity. On April 6, 1987, this case was removed to this Court pursuant to 12 U.S.C. §1819 (fourth). On May 21, 1987, the FDIC in its corporate capacity was formally substituted as the Party Plaintiff in this action.

The Court therefore finds that it has jurisdiction over parties and over the subject matter of this action; the Court further finds that all of the material allegations in Plaintiff's Complaint are true.

The Court finds that each Defendant made, executed and delivered a guaranty agreement herein sued upon by the Plaintiff; that the Plaintiff is the owner and the holder of the two guaranty agreements herein sued upon, and that the maximum liabilty capable of being incurred on each of the guaranty agreements is $10,000.

The Court further finds that the two guaranty agreements were given to secure payment of the total indebtedness accruing on a $33,000 Promissory Note executed by Tim Russell and Sheila Mahan, now Russell, to the Powells; said note was subsequently assigned by the Powells to First National Bank of Sapulpa, and it is currently in default with the total indebtedness currently exceeding the $20,000 combined maximum limit on both guaranty agreements subject to this action.

The Court further finds that said Defendants, Richard and Thelma Powell, and each of them have defaulted in the performance of the terms and conditions of said guaranty agreements, as alleged in Plaintiff's Complaint, and that the Plaintiff is entitled to have judgment entered on its behalf against each Defendant individually in the sum of $10,000.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that FDIC's Motion for Summary Judgment be hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that FDIC is hereby granted judgment against Richard Powell in the amount of $10,000 along with post-judgment interest at the rate of 7.22% per annum from the date of judgment until the same is fully paid.

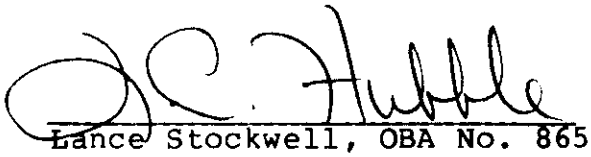
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that FDIC is hereby granted judgment against Thelma Powell in the amount of $10,000 along with post-judgment interest at the rate of 7.22 % per annum from the date of judgment until the same is fully paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that FDIC be awarded its costs in this action pursuant to Fed. R. Civ. P. 54(d).

S/ THOMAS R. BRETT

The Honorable Judge Thomas R. Brett
United States District Court of
the Northern District of Oklahoma

APPROVED AS TO FORM:



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ATTORNEYS FOR PLAINTIFF
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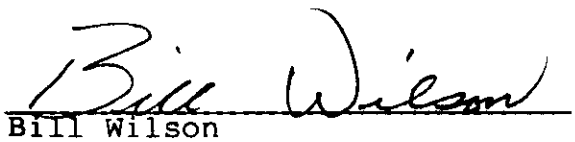

Bill Wilson

ATTORNEY FOR DEFENDANTS
RICHARD AND THELMA POWELL

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SAMUEL DAVID VELAZQUEZ, Petitioner, v. MICHAEL J. GASSETT, individually and as Special Judge, Tulsa County District Court, and one or more John/Jane Does, Respondents.	)	87-C-19-B

ORDER

Samuel David Velazquez brought this action as a civil rights complaint under Title 42 U.S.C. §1983, against Tulsa County Special Judge J. Michael Gassett and one or more unnamed defendants, alleging that Judge Gassett denied him due process of law by imprisoning him for failure to pay monies owed to his ex-wife pursuant to court orders. He further alleges that Judge Gassett, acting in conjunction with one or more unnamed defendants, conspired to obstruct justice and to deny Velazquez his constitutional rights.

Because the relief sought in the complaint is immediate release from confinement, the court ordered that this matter be treated as an application for a writ of habeas corpus under 28 U.S.C. §2254.

Respondent Gassett has responded to the merits of Velazquez's claims and seeks dismissal of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and 28 U.S.C. §1915(d).

Velazquez has not filed a response to the motion to dismiss. Magistrate John Leo Wagner previously granted Velazquez an extension of time in which to respond and advised him that should no response be forthcoming, the court would proceed and consider the merits of the motion to dismiss. Having afforded petitioner ample opportunity to respond, the court now turns to the motion at hand.

The facts giving rise to this application stem from petitioner's divorce case. On August 14, 1984, petitioner's wife, Betsi Velazquez ("Betsi") filed for divorce from petitioner. Betsi was given temporary custody of the child born of the marriage on September 17, 1984. On July 1, 1985, the divorce was granted. Betsi was given permanent custody of the child and was awarded child support in the amount of $100.00 per month. Betsi was also given a judgment for $550.00 for child support arrearage. The court ordered that petitioner be restrained from taking the child out of the county.

On August 11, 1985, petitioner had his scheduled visitation with the child, and he kidnapped his daughter. Betsi then filed an Application for Contempt against petitioner for kidnapping the child, and a Motion to Modify the Divorce Decree to terminate petitioner's visitation rights. On October 15, 1985, a court order was entered terminating petitioner's visitation rights. Betsi filed an Application for a Contempt Citation which was set for hearing on May 6, 1986. Stanley D. Monroe was appointed to represent petitioner in the contempt matter. The contempt hearing was passed from May 6, 1986 and was held on July 9, 1986,

at which time petitioner appeared with counsel and testified in his own behalf.

Judge Gassett found petitioner in contempt and ordered him to pay $4,000.00 in back child support and medical bills as previously ordered by the court. Sentencing was passed for two months to give petitioner an opportunity to pay the amount owed. Petitioner was not held in custody for these two months. The court advised petitioner of his right to appeal the contempt finding. Petitioner filed a motion for a new trial, which was overruled on July 24, 1986. On September 26, 1986, petitioner was sentenced to six months in the Tulsa County Jail for contempt of court. On December 19, 1986 petitioner, his attorney, and Betsi's attorney appeared in court and Judge Gassett reduced the purge amount to $2,000.00.

Rule 11 of the Rules Governing §2254 Cases provides that the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with the §2254 Rules, may be applied to §2254 habeas corpus petitions. Federal Rule of Civil Procedure Rule 12(b)(6) allows for dismissal of a complaint if the court finds that it fails to state a claim upon which relief may be granted. In this situation, the court finds that the application of Rule 12(b)(6) is appropriate.

Title 28 U.S.C. §2254 provides in part:

> (a) .... a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

A review of copies of the court records from petitioner's divorce case, JFD-84-3458, convinces the court that petitioner is not incarcerated in violation of the Constitution or laws of the United States.

Petitioner alleges that he has been incarcerated in violation of his rights to due process and a jury trial and in violation of his privilege against self-incrimination. The transcript of his contempt hearing clearly reveals that petitioner was afforded due process. He was represented by counsel, given a hearing before the court, and allowed to present evidence on the contempt charge. Petitioner was not forced to testify; his right not to incriminate himself was not violated. As for his claim that he was denied a right to a jury trial, petitioner cites 21 O.S. §567, which provides for a jury trial for one charged with contempt, if the accused contemner demands a jury trial.[1] Petitioner, however, did not demand a jury trial on the contempt charge.

The court rejects petitioner's claim that Judge Gassett subjected him to cruel and unusual punishment. Petitioner was ordered to pay amounts owed under previous court orders. Petitioner was aware of the amounts owed and had the funds

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1 A thorough review of the file in the state court proceedings reveals no demand for a jury trial prior to the contempt hearing by the court. 21 O.S. §567 provides in pertinent part:

> In all cases of indirect contempt the party charged with contempt shall be notified in writing of the accusation and have a reasonable time for defense; and the party so charged shall, upon demand, have a trial by jury.... (Emphasis added.)

available to pay them when they came due. (Tr. of July 9, 1986 hearing, page 4). Failure to do so constituted indirect contempt of court. 21 O.S. §565. The court finds that six months imprisonment for such offense is within the boundaries of the law (21 O.S. §566) and is not violative of the Eighth Amendment proscription against cruel and unusual punishment. Petitioner has not alleged any circumstances which would persuade the court otherwise.

Finally, petitioner alleges that Judge Gassett conspired with other unnamed persons to violate petitioner's constitutional rights. Not a single factual allegation is presented to support this claim. Conclusory allegations of constitutional deprivations will not suffice. Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981). Further consideration of his conspiracy claim is therefore unwarranted.

Having concluded that petitioner is not incarcerated in violation of the Constitution or laws of the United States, it is Ordered that petitioner's complaint, considered under §2254, be and is hereby dismissed.

Dated this 15th day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

BARNETT-RANGE CORPORATION; WOODLAND HILLS/BOULDER RIDGE JOINT VENTURE; BARNETT-RANGE HOLDING COMPANY NO. 1; BARNETT-RANGE PROPERTY SERVICE CORPORATION; AETNA CASUALTY & SURETY COMPANY; and ALL OWNERS d/b/a BOULDER RIDGE APARTMENTS; LINDA HANES and FLOYD HANES,

Defendants.

No. 86-C-709-B

FILED

SEP 15 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

AMENDED ORDER OF DISMISSAL WITH PREJUDICE

This cause comes before the Court on Plaintiff's Application for Dismissal of Claim Presented Against defendants, Barnett-Range Corporation, Woodland Hills/Boulder Ridge Joint Venture, Barnett-Range Holding Company No. 1, Barnett Range Property Service Corporation, and All Owners d/b/a Boulder Ridge Apartments, Linda Hanes and Floyd Hanes, and the Court, finding that the dismissed defendants have no objection to plaintiff's voluntary dismissal of the claim presented against it in the above-styled case, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, that said defendants have filed no counterclaims against the plaintiff in this action, and that there are no conditions known to said defendant or to the plaintiffs to be placed on the dismissal of the claim presented against the dismissed defendants, grants the plaintiff's motion.

IT IS, THEREFORE, ORDERED that the claim presented against Barnett-Range Corporation, Woodland Hills/Boulder Ridge Joint Venture, Barnett-Range Holding Company No. 1, Barnett Range Property Service Corporation, and All Owners d/b/a Boulder Ridge Apartments, Linda Hanes and Floyd Hanes, shall be, and are hereby,

dismissed with prejudice to any further action and with no conditions placed thereon.

Dated this 15 day of September, 1987.

S/ THOMAS R. BRETT

~~JAMES O. ELLISON~~
United States District Judge

COPIES TO:

Joseph A. Sharp, 1500 ParkCentre, 525 S. Main, Tulsa, OK 74103;

Alfred K. Morlan, 3800 First National Tower, Tulsa, OK 74103;

C. Jack Maner, 100 Center Plaza, Suite A, Tulsa, OK 74119;

John H. Tucker, 2800 Fourth National Building, Tulsa, OK 74119;

Richard D. Wagner, P.O. Box 1560, Tulsa, OK 74101-1560

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LORENZO JONES,

Plaintiff,

v.

MARGARET M. HECKLER,
Secretary of Health &
Human Services,

Defendant.

84-C-446-C

FILED

SEP 15 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JUDGMENT

In accordance with the Order filed this date, the Court hereby enters Judgment in favor of Plaintiff's counsel, Paul F. McTighe, Jr., in the sum of One Thousand Four Hundred Thirty-One Dollars and Five Cents ($1,431.05), in fees for representation in this Court, out of the benefits awarded Plaintiff, Lorenzo Jones.

ENTERED this 15th day of September, 1987.

H. DALE COOK, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 14 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

FIRSTTAKE PRODUCTIONS, INC.,	)	
Plaintiff,	)	
v.	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	
Defendant.	)	No. 85-C-1056-E

ORDER OF DISMISSAL

This matter comes before the Court on the Stipulation of Dismissal of the parties in this action. The Court finds this matter should be and is hereby ordered dismissed with prejudice to the refiling thereof by either party.

[illegible] BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ALAN J. ASHLEY, D.C. and McALESTER HEALTH SERVICES CLINIC, INC.,

Plaintiffs,

vs.

INDEPENDENT MEDICAL EVALUATIONS OF OKLAHOMA, INC.; GARY ROUNSAVILLE; MERLE JENNINGS,D.O.; RENEE BLEDSAW; ROBERT BAKER, J.D.D.O.; FLOYD GRIFFIN, R.N.M.S.; CHARLES E. DUVALL, D.C.,

Defendants.

No. 87-C-58-C

ORDER

Before the Court for its consideration is a motion to dismiss brought by defendants Independent Medical Evaluations of Oklahoma, Inc.; Gary Rounsaville; Merle Jennings; Renee Bledsaw; Robert Baker; Floyd Griffin and Charles E. Duvall. Defendants allege four grounds for dismissal. First, under Rule 12(b)(6) F.R.Cv.P. they assert plaintiffs' claim brought pursuant to 18 U.S.C. §1961 et seq., Racketeer Influence and Corrupt Organization Act (RICO), fails to state a claim upon which relief can be granted. Second, under United States v. Turkette, 452 U.S. 576 (1981) they assert plaintiffs' claim fails to establish the existence of an enterprise necessary to bring a RICO action.

Third, they assert that plaintiffs' claim fails to allege the defendants participated in an enterprise through a pattern of racketeering activity. Finally, defendants rely on Sedima, S.P.R.L. v. Imrex Co., Inc., 105 S.Ct. 3275 (1985) in asserting plaintiffs fail to allege an injury necessary to bring a civil RICO action under 18 U.S.C. §1964(c).

Plaintiff Alan Ashley is a Chiropractor licensed under the laws of the State of Oklahoma. Plaintiff McAlester Health Services Clinic, Inc. is an Oklahoma corporation owned and operated by plaintiff, Alan Ashley. In their amended complaint, plaintiffs contend that defendants violated the RICO act by engaging in mail fraud. Plaintiffs assert, as set forth in their amended complaint, the following allegations to support their RICO claim:

> That on or about the 23rd day of May, 1986, Defendant, Independent Medical Evaluations of Oklahoma, Inc., and more particularly, Dr. Merle Jennings, a D.O., a non-Chiropractor, held himself out to be a Chiropractor and reviewed a Chiropractic claim. That said review and the results of said review were sent through the United States mails through the State of Oklahoma ....
>
> That a pattern of racketeering occured (sic) on or about the 2nd day of January, 1986, wherein Charles E. Duvall, a non-licensed Chiropractor in the State of Oklahoma, acted as a reviewer for Chiropractic claims in Oklahoma. Said review was to determine the customary and reasonable charges in the State of Oklahoma, and as such, since Independent Medical Evaluations of Oklahoma, Inc., is an Oklahoma Corporation and reviews Oklahoma claims, said Corporation falsely implied that Charles E. Duvall was in truth and in fact a Chiropractor licensed within the State of Oklahoma .... That the specific fraud is that Independent Medical Evaluations of Oklahoma,

> Inc. hold themselves out as Chiropractors when in truth and in fact they are no (sic) Chiropractors, not licensed as Chiropractors and not engaged in Chiropractic medicine when they determined the usual and reasonable fees of a Chiropractor, a fact not made known to various individuals who use their services.

Based on these allegations, plaintiffs assert that defendants conducted the affairs of an enterprise through a pattern of racketeering activity within the meaning of RICO. Therefore the Court will focus its attention on the determinative issue of whether the factual allegations are sufficient to set out a pattern of racketeering activity within the ambit of RICO.

Section 1962(c) states:

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
> 18 U.S.C. §1962(c).

A violation of §1962(c) thus "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., supra at 3285. RICO defines racketeering activity as, inter alia, any act that is indictable under 18 U.S.C. §1341 (mail fraud). See 18 U.S.C. §1961(1)(B). RICO also states that a "pattern of racketeering activity" requires at least two acts of racketeering activity. 18 U.S.C. §1961(5). In Sedima the court noted that the RICO definition of pattern implies that "while two acts are necessary, they may not be sufficient." Id. at 3285 n.14. Plaintiffs allege that the defendants sent reviews through the mails on two occasions. In

Sedima, the court said, "conducting an enterprise that affects interstate commerce is obviously not in itself a violation of §1962, nor is mere commission of the predicate offenses." Id. at 3285. The Supreme Court elaborated on the requirement of "pattern" by saying:

> The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." (citation omitted). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship .... So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern ...." (citation omitted). Sedima at 3285 f.n.14.

Sedima thus makes clear that a RICO violation requires continuous and related racketeering acts. In order to state an action under RICO plaintiffs must allege that defendants' acts are "part of a common fraudulent scheme" and that there is a "threat of continuing activity." See Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928 (10th Cir. 1987). RICO does not apply to "sporadic activity" nor to an "isolated offender". Id. In Torwest the court cites authority from various other circuits that allegations of acts to defraud one victim using one scheme is insufficient to support a RICO claim. See e.g.. Lipin Enters. Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) cited in Torwest, supra at 929.

In Condict v. Condict, 815 F.2d 579 (10th Cir. 1987) the court cautioned that the RICO statute cannot be used when the gravamen of a complaint is that defendants engaged in common law fraud and deceit and in the course of their conduct used the mails and wires more than twice. Such a scenario, in and of itself, does not establish a RICO claim under §1962(c).

Under the directives of Sedima as interpreted by Torwest and Condict the Court finds and concludes that the present complaint does not state a cause of action under RICO. "Rather, this is but an unsuccessful effort to dress a garden variety fraud and deceit case in RICO clothing." Condict, supra at 585.

WHEREFORE, premises considered, it is the Order of the Court that the motion to dismiss brought by defendants Independent Medical Evaluations of Oklahoma, Inc.; Gary Rounsaville; Merle Jennings; Renee Bledsaw; Robert Baker; Floyd Griffin; and Charles E. Duvall is hereby GRANTED.

IT IS SO ORDERED this 14th day of September, 1987.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEY FINANCIAL SERVICES, INC., a corporation,

Plaintiff,

v.

EQUITY GROUP PARTNERSHIP, an Oklahoma partnership; FREDERICK H. NORTHROP, an individual; HARRIS J. MORELAND, an individual; CHRISTOPHER D. GRISEL, an individual; THE FIRST INTERESTATE BANK OF OKLAHOMA, N.A., Administrator of the Estate of Glenn C. Ball,

Defendants.

No. CS 87-C-30-B

FILED
SEP 14 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

JUDGMENT

This cause comes on to be heard before the undersigned Judge, this 14 day of September, 1987, on Request for Entry of Judgment Upon Stipulation of the Parties filed herein on September 10, 1987, and it appears to the Court that the plaintiff and defendants have agreed to the following:

1. This case was commenced on January 14, 1987, the Plaintiff Key Financial seeking a money judgment against Defendant, Equity Group, upon a promissory note and loan agreement, and against the individual Defendants, upon their personal guaranties of the promissory note.

2. Defendants Northrop and Moreland asserted a cross-claim against Defendant Grisel, seeking contribution and an accounting of the partnership affairs and performance of Grisel's personal guaranty.

3. In their answers, the Defendants have admitted the execution of the Promissory Note, the amounts due thereunder, the delinquency under the terms of the Promissory Note, and the right of Key Financial to repossess certain collateral.

4. Repossession of the aircraft pledged as collateral took place on November 26, 1986. The aircraft was sold on December 29, 1986 for $250,000.

5. After application of the sales proceeds to the costs of repossession of the collateral and the expenses of sale, there remained due and owing under the note the sum of $145,313.03, principal and interest, as of December 29, 1987.

6. As of September 1, 1987, the amount due and owing to Key Financial is $157,064.45 plus interest accruing at 12 percent per annum until paid.

7. Each Defendant is liable for the total amount pursuant to the terms of their Guaranty Agreement.

As partners of Equity Group Partnership, each partner is entitled by way of contribution to recover payments made on behalf of another partner.

IT IS HEREBY ORDERED ADJUDGED AND DECREED, judgment be entered in favor of the Plaintiff Key Financial Services, Inc. against Defendants Equity Group Partnership, Frederick H. Northrop, Harris J. Moreland, and Christopher D. Grisel, jointly and severally, in the sum of $157,064.45 as of September 1, 1987 with interest accruing thereafter at $47.77 per diem until paid,

and attorneys fees, and the costs of this proceeding to be taxed upon application.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered jointly and severally in favor of any defendant paying more than his or their share of said judgment and against each and every defendant for the amounts which they failed to pay on said judgment including attorney fees, interest and costs.

S/ THOMAS R. BRETT

Thomas R. Brett
UNITED STATES DISTRICT JUDGE

APPROVED:

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ATTORNEY FOR DEFENDANT,
CHRISTOPHER D. GRISEL

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

McLEAN FINANCIAL CORPORATION,

Plaintiff,

vs.

JOHN R. JUNGER, JR. and RITA J. JUNGER, husband and wife; and THE UNITED STATES OF AMERICA, EX REL THE INTERNAL REVENUE SERVICE,

Defendants.

Case No. 87-C-413 B

JOURNAL ENTRY OF JUDGMENT

NOW on this 11th day of September, 1987, this matter comes on for consideration, Plaintiff appearing by and through its attorney of record, Gregg R. Renegar of Kornfeld Franklin & Phillips, John R. Junger, Jr. and Rita J. Junger, husband and wife appearing by and through their attorney of record Warren G. Morris and the United States of America, ex rel the Internal Revenue Service appearing by and through Phil Pinnell, Assistant United States Attorney for the Northern District of Oklahoma. The Court having examined the pleadings, process and file in this case, and being fully advised in the premises finds:

1. That it has jurisdiction of the parties hereto and the subject matter herein.

2. That the Defendants, John R. Junger, Jr. and Rita J. Junger, husband and wife, by and through their counsel of record have consented to the Entry of Judgment over and against them as set forth in the Plaintiff's Complaint filed herein on May 29, 1987, therefore the allegations and averments of Plaintiff's Complaint should be taken as true, and said Defendants should be

cut off from claiming any right, title or interest in the property hereinafter described.

3. That the Defendants, John R. Junger, Jr. and Rita J. Junger, husband and wife, made, executed and delivered a certain Note and Mortgage to Oklahoma Mortgage Company for value received, on the 7th day of May, 1984, which Mortgage is recorded in Book 655 at Page 761, in the office of the County Clerk of Osage County, Oklahoma, on the 21st day June, 1984 after the required mortgage tax was paid and re-recorded in Book 658 at Page 119; and that said Plaintiff is the owner and holder thereof by virtue of a certain Assignment of Mortgage recorded in Book 658 at Page 129 in the office of the County Clerk of Osage County, State of Oklahoma. Said Mortgage is secured by the following-described real estate situated in Osage County, State of Oklahoma, to-wit:

> Lot Eight (8) in TRAILS END ESTATES, a Subdivision in Osage County, Oklahoma, as shown by the recorded plat thereof,

together with the buildings, improvements, appurtenances, hereditaments and all other rights thereunto appertaining or belonging, and all fixtures then or thereafter attached or used in connection with said premises.

4. That the only claim in said property of said Defendants, John R. Junger, Jr. and Rita J. Junger, husband and wife, are under a Warranty Deed which claim is subject and inferior to the Note and Mortgage of Plaintiff.

5. That the Mortgage herein sued upon provides that appraisement of said premises is waived or not waived at the option of the Mortgagee, and the Court finds that the Plaintiff

has stated its election, under the terms of said Mortgage, to have said real estate sold with appraisement.

6. That the Defendants, John R. Junger, Jr. and Rita J. Junger, husband and wife, are in default on the Note and Mortgage and that there is now due, owing and unpaid to Plaintiff upon said Note and Mortgage the sum of $67,079.38; with accrued interest thereon from the 1st day of August, 1986 to the date of judgment at the rate of interest as provided in the Note; post-judgment interest from the date of judgment at 14.00% per annum, until paid; attorneys' fees in the sum of $6,750.00; abstract expenses in the sum of $260.00; advances for mortgage insurance in the sum of $219.21; property inspection in the sum of $140.00; property insurance in the amount of $399.00; and costs in the sum of $130.00, for which amount said Mortgage is a first, prior and superior lien upon the real estate and premises above described.

7. That as Defendants, John R. Junger, Jr. and Rita J. Junger, husband and wife, have defaulted under said Note and Mortgage, as alleged in the Complaint, Plaintiff as owner and holder of said Note and Mortgage is entitled to judgment as aforesaid.

The the Defendant, the United States of America, ex rel Internal Revenue Service by virtue of a notice of federal tax lien under Internal Revenue laws in the amount of $4,097.48 filed in the records of the County Clerk of Osage County, State of Oklahoma, in Book 4980 at Page 314, dated October 24, 1986, has a good and valid lien upon the property which is subject and inferior to Plaintiff's prior recorded purchase money mortgage, but superior

to the interest and claim of John R. Junger, Jr. and Rita J. Junger.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, McLean Financial Corporation, have judgment against the Defendants, John R. Junger, Jr. and Rita J. Junger, husband and wife, under said Note and Mortgage in the sum of $67,079.38; with accrued interest thereon from the 1st day of August, 1986 to the date of judgment at the rate of interest as provided in the Note; post-judgment interest from the date of judgment at 14.00% per annum, until paid; attorneys' fees in the sum of $6,750.00; abstract expenses in the sum of $260.00; advances for mortgage insurance in the sum of $219.21; property inspection in the sum of $140.00; property insurance in the amount of $399.00; and costs in the sum of $130.00, for which amount said Mortgage is a first, prior and superior lien upon the real estate and premises above described.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, the United States of America ex rel the Internal Revenue Service has a good and valid lien on said property in the amount of $4,097.48 for a federal tax lien, with interest accruing thereon which lien is subject and subordinate to Plaintiff's prior record Purchase Money Mortgage and judgment rendered herein in favor of the Plaintiff, but superior to the interest of John R. Junger, Jr. and Rita J. Junger.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that any and all right, title or interest which the Defendants, John R. Junger, Jr. and Rita J. Junger, husband and wife, have or claim to

have in or to said real estate or premises, is subsequent, junior and inferior to the Mortgage and Lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Mortgage be, and the same is hereby, foreclosed and the premises are hereby ordered to be sold to satisfy the judgment herein; that Special Execution and Order of Sale in Foreclosure shall issue, commanding the Sheriff of Osage County, Oklahoma, to levy upon the above-described real estate, and after having the same appraised as provided by law, proceed to advertise and sell the same, as provided by law and apply the proceeds arising from said sale as follows:

FIRST: To the payment of costs of sale and court costs herein.

SECOND: To the payment of the judgment and lien of the Plaintiff in the amounts set forth herein.

THIRD: The remainder, if any, to be paid to the United States of America to satisfy the tax lien above-referenced.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that upon confirmation of the sale and delivery of Sheriff's Deed, under and by virtue of this judgment and decree, that said property shall be free and clear of the claims of all Defendants and that all persons claiming under said Defendants since the filing of the Complaint herein, shall have no right, title, interest, claim, lien or demand in or demand in or to said property.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the United State of America shall have a statutory right of redemption for a

period of 120 days from the date of the sheriff's sale as provided by 28 U.S.C. §2410(c).

S/ THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM:

KORNFELD FRANKLIN & PHILLIPS

By _____
Gregg R. Renegar, OBA #7500
301 N. W. 63rd, Suite 600
Oklahoma City, Oklahoma 73116
(405) 840-2731
of KORNFELD FRANKLIN & PHILLIPS
Attorneys for Plaintiff,
McLean Financial Corporation

_____
Warren G. Morris
5109 S. Wheeling, Suite B
Tulsa, Oklahoma 74105
Attorney for Defendants, John R. Junger, Jr.
and Rita J. Junger

_____
Phil Pinnell, Assistant District Attorney
U.S. Attorneys Office
333 W. Fourth Street
Tulsa, Oklahoma 74103

Attorney for United States of America
ex rel Internal Revenue Service
County Treasurer of Osage County
and The Board of County Commissioners
of Osage County

87-756/17/110

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

C. RABON MARTIN, Plaintiff, vs. DARRELL J. SEKIN & CO., d/b/a SEKIN & COMPANY, Defendant.	)	No. 87-C-227-B

STIPULATED DISMISSAL WITH PREJUDICE

Plaintiff C. RABON MARTIN, by his attorney John S. Turner and Defendant DARRELL J. SEKIN & COMPANY, by its attorneys Patton, Brown hereby stipulate that the captioned cause be dismissed with prejudice.

Respectfully submitted,

JOHN S. TURNER, OBA #9134, Attorney
for Plaintiff C. Rabon Martin

PATTON, BROWN

BY: _____
FRANK R. PATTON, JR., OBA #6961
Attorneys for Defendant Darrell
J. Sekin & Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J.W. "RAY" SMITH, Plaintiff,	)	
vs.	)	No. 86-C-643-C
FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, Defendant.	)	

FILED
SEP 11 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

UPON the Joint Stipulation For Dismissal With Prejudice of Plaintiff J.W. "Ray" Smith and Defendant The First National Bank and Trust Company of Tulsa, it is hereby ordered that the captioned case is dismissed with prejudice, each party to bear his or its own costs, expenses, and attorneys' fees.

DATED this 9 day of September, 1987.

H. DALE COOK,
OF OKLAHOMA
NORTHERN DISTRICT

87/37078

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
FREDDIE J. PORCH,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-796-C

ORDER OF DISMISSAL

Now on this 8th day of September, 1987, it appears that the Defendant in the captioned case has not been located within the Northern District of Oklahoma, and therefore attempts to serve him have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against Defendant, Freddie J. Porch, be and is dismissed without prejudice.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

PEP/mp

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEE A. COLLINS, Plaintiff, vs. THE OKLAHOMA COLLEGE OF OSTEOPATHIC MEDICINE AND SURGERY; THE BOARD OF REGENTS OF THE OKLAHOMA COLLEGE OF OSTEOPATHIC MEDICINE AND SURGERY; THOMAS J. CARLILE; FRED D. CORMACK; FANNIE HILL; SIMON D. PARKER; R. JEANNE ROUSH; WALTER L. WILSON; LEONA R. LIMON; JOHN BARSON; JACK R. WOLFE; and SUE MCKNIGHT, Defendants.	)	Case No. 85-C-602-CE

FILED

SEP 10 1987

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

COME NOW the parties, by and through their undersigned attorneys of record, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure dismiss with prejudice the above-styled cause of action.

FRASIER & FRASIER

By: _____

Steven R. Hickman
1700 Southwest Blvd., #100
P. O. Box 799
Tulsa, Oklahoma 74101
(918) 584-4724

ATTORNEYS FOR PLAINTIFF

-and-

FELDMAN, HALL, FRANDEN, WOODARD
& FARRIS

By: _____

William S. Hall
525 South Main, Suite 1400
Tulsa, Oklahoma 74103
(918) 583-7129

ATTORNEYS FOR DEFENDANTS

-and-

McCORMICK, ANDREW & CLARK
A Professional Corporation

By: _____

Stephen L. Andrew
Suite 100, Tulsa Union Depot
111 East First Street
Tulsa, Oklahoma 74103
(918) 583-1111

ATTORNEYS FOR DEFENDANTS

FILED

SEP 10 1987

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TUBULAR CORPORATION OF AMERICA, INC., an Oklahoma corporation,

Plaintiff,

vs.

SOCIETA EUROPEA TUBIFICI E ACCIAIERIE s.p.a., an Italian corporation, and S.E.T.A. US Ltd., a Delaware corporation,

Defendants.

Case No. 87-C-31-E

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiff Tubular Corporation of America, Inc., pursuant to Federal Rule of Civil Procedure 41(a)(1)(i), hereby dismisses its action without prejudice as to Defendant S.E.T.A. US Ltd. only while preserving its claims against Defendant Societa Europea Tubifici Acciaierie s.p.a.

LIEN CLAIMED

BOB F. McCOY
DOUGLAS L. INHOFE
GEORGE H. LOWREY

By _____
George H. Lowrey

2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Plaintiff
TUBULAR CORPORATION OF AMERICA, INC.

87/57196

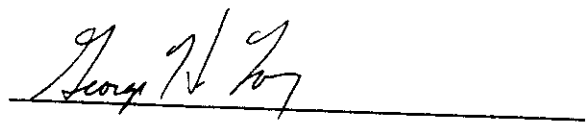
OF COUNSEL:

CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 10th day of September, 1987, he mailed a true and correct copy of the foregoing Notice Of Dismissal Without Prejudice, to:

Kent L. Jones
Donald L. Kahl
4100 Bank of Oklahoma Tower
Tulsa, Oklahoma 74172



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JI CASE COMPANY and JI CASE CREDIT CORPORATION,	)	
Plaintiff,	)	
Vs.	)	No. 87-C-130E
TULSA TRACTOR COMPANY, INC. CHARLES L. JOHNSTON, LARRY CLINTON JOHNSTON, JANET E. JOHNSTON & SANDRA JOHNSTON,	)	
Defendants.	)	

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated that pursuant to the Rule 41(A)(1), the above entitled action is to be dismissed, with prejudice, with each party to bear his own costs and attorney fees.

JI CASE COMPANY
JI CASE CREDIT CORPORATION

By: _____
O. Clifton Gooding (OBA #10315)

Of the Firm:

DERRYBERRY, QUIGLEY, PARRISH,
GOODING & NANCE
4800 N. Lincoln Blvd.
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(405) 528-6569

Attorney(s) for Plaintiff
JI CASE COMPANY
JI CASE CREDIT CORPORATION

Donald Flasch
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Tulsa, OK 74114
(918) 747-7764

Chris Economou (OBA #2610)
Attorney at Law
5136 E. 21st
Tulsa, OK 74114

Terry L. Weber (OBA #10149)
Attorney at Law
1608 South Elwood Ave.
Tulsa, OK 74119

Attorney for Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 10 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff, vs. ONE PARCEL OF REAL PROPERTY WITH BUILDINGS, APPURTENANCES, AND IMPROVEMENTS, KNOWN AS 225 BEACH DRIVE, SOUTH LAKE TAHOE, CALIFORNIA, Defendant.	)	CIVIL ACTION NO. 86-C-1076-E

JUDGMENT OF FORFEITURE

This cause having come before this Court upon Plaintiff's Application and being otherwise fully apprised in the premises, it is hereby

ORDERED, ADJUDGED, AND DECREED that judgment be entered against the Defendant, one parcel of real property with buildings, appurtenances, and improvements, known as 225 Beach Drive, South Lake Tahoe, California, more fully described as follows:

> All that lot, tract or parcel of land situate, lying and being in South Lake Tahoe, California, shown and designated as Lot 49 in Pine Stone Unit No. 3,

and against all persons interested in such property and that the said property be and the same is hereby forfeited to the United States of America.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney

CATHERINE J. DEPEW
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMUEL B. WINTERS,

Plaintiff,

vs.

ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation; CLEO C. WHITE, an individual; JOSEPH J. ROSLANSKY, an individual,

Defendants.

No. 87-C-54-E

JUDGMENT

This matter came on before the Court on the Motion to Dismiss the second and third causes of action against Defendant Rockwell International Corporation, the Motion to Dismiss the fourth cause of action against Defendant Cleo C. White and the Motion to Dismiss the fifth cause of action against Defendant Joe Roslansky. The issues having been duly considered and a decision having been reached as set forth in the Order filed herein on May 26, 1987, this Court finds that judgment should be entered on behalf of Defendant Rockwell as to the second and third causes of action, Defendant White as to the fourth cause of action, and Defendant Roslansky as to the fifth cause of action as against the Plaintiff, Samuel B. Winters, together with the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered on behalf of Defendant Rockwell International, Inc. as to the second and third causes of action, on behalf of Defendant White as to the fourth cause of action, and on behalf

of Defendant Roslansky as to the fifth cause of action and against the Plaintiff, Samuel B. Winters.

ORDERED this 10th day of September, 1987.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 10 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ZOMBA ENTERPRISES, INC., et al.

Plaintiffs,

vs.

MURPHY ENTERPRISES, INC., d/b/a MURPHY BROTHERS EXPOSITION,

Defendant.

No. 87-C-272-E

ORDER OF DISMISSAL

This matter comes on for consideration on this 9 day of September, 1987 on the Application of the parties for an Order of Dismissal.

The Court being fully advised in the premises finds that this matter should be dismissed.

IT IS SO ORDERED this 9 day of Sept, 1987.

/s/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

C.I.T. CORPORATION, a foreign corporation, Plaintiff,	)	
v.	)	No. 85-C-1135-B
PORT PRECISION METALS CORPORATION, an Oklahoma corporation, J. P. OIL CORPORATION, a Kansas corporation, and PHILIP A. HAMM, an individual, Defendants.	)	

J U D G M E N T

In accord with the Order filed this date, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff, C.I.T. CORPORATION, now known as the C.I.T. Group/Equipment Financing, Inc., have and recover judgment against the Defendants, Port Precision Metals Corporation, an Oklahoma corporation, J. P. Oil Corporation, a Kansas corporation, and Philip A. Hamm, an individual, on the Plaintiff's claim for deficiency judgment in the amount of Sixty-Four Thousand One Hundred Thirty-Seven and 32/100 Dollars ($64,137.32), together with interest and costs. Judgment is also entered in favor of the Plaintiff and against the Defendants on the Defendants' counterclaim, and the Defendants are to take nothing on their counterclaim.

ENTERED this 9th day of September, 1987.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES E. CLAYTON, et al.,

Plaintiffs,

v.

FRANK THURMAN, Sheriff of Tulsa County, Oklahoma, et al.,

Defendants.

No. 79-C-723-B

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(COMPLIANCE HEARING)

INTRODUCTION

This civil rights class action brought by the past and present inmates of the Tulsa City-County Jail was commenced on December 18, 1979. The lawsuit was brought pursuant to 42 U.S.C. §1983 concerning the conditions of confinement and the operation of the jail, alleging constitutional violations in the areas of racial segregation, women's rights, visitation, use of mails, access to the courts and legal material, medical, prisoner security, due process, recreation and exercise, and religion. While incidents of overcrowding have been referred to, it has not been contended by Plaintiffs that the Tulsa County Jail System is constitutionally deficit as a result of overcrowding per se.

The case was tried before a three-judge panel sitting en banc in accordance with Local Rule 18 on May 31, June 1, 2, 6, and 7, 1983. The Court toured the facilities comprising the Tulsa County Jail System on June 17, 1983.

On August 2, 1983, the Court issued its Findings of Fact and Conclusions of Law finding the Tulsa City-County Jail met constitutional standards in many alleged deficient areas but found constitutional violations by the Defendant in specified areas of equal protection, medical, prisoner security, due process, physical exercise, and religion. In Conclusion of Law No. 39, the Court ordered the Defendants to submit a plan within sixty days remedying the deficiencies in such areas as follows:

1. Equal Protection. Assignment of trustee jobs to women inmates on an equal basis with men; access to a minimum security facility comparable to the Adult Detention Center; and protection of the privacy right of women not to be viewed by male trustees or guards while nude or while using the shower and toilet facilities.

2. Medical. Licensing of various paramedics; pharmacist consultation for proper dispensing of prescription medication; privacy for women inmates during physical examinations; and written medical operating policy in line therewith and an appropriate medical review policy.[1]

3. Prisoner Security. Increases in staffing of the Eighth and Ninth Floors and physical changes in the bulkheads to improve viewing, for inmate security; report to the Court concerning the results of the recently-implemented 15-minute tours on the catwalks; plan for periodic fire inspection drills.

4. Due Process. Upgrading or restricted use of "A-Section".

5. Physical Exercise. Recreational or exercise facililties of inmates confined in excess of 30 days.

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1 The licensing requirement was subsequently vacated by the trial Court as an Eleventh Amendment violation. Such was subsequently reviewed by the Tenth Circuit Court of Appeals and on February 23, 1987, was dismissed because in the interim Oklahoma licensed medical personnel, i.e. registered nurses and practical nurses, were employed to staff the jail system, thereby rendering the matter moot.

6. Religion. Opportunity for group religious services at the Adult Detention Center.

On September 30, 1983, Defendants submitted their initial plan. On February 15, 1985, the Court approved the Defendants' final plan submitted on December 5, 1984, and set forth certain compliance requirements.

On September 27, 1985, the Defendants filed a compliance report detailing the changes which had been made to the Tulsa City-County Jail and the Plaintiffs filed their response on April 16, 1986, and the Defendants replied thereto on April 24, 1986, requesting the action be dismissed, asserting the Defendants were in compliance.

Thereafter, the case came on for hearing regarding Defendants' compliance with the Constitution of the United States and motion to dismiss on February 24, 25 and 26, March 26, April 2, and April 7, 1987. The hearing was conducted en banc, with the exception of the Honorable H. Dale Cook, who was excused from hearing the evidence by consent of the parties. Because of the demands of other cases, the Honorable James O. Ellison was unable to attend parts of the hearing but has reviewed the audio tapes of that evidence. The testimony of Dr. Frank Rundle regarding the medical system within the jail was submitted by the Plaintiffs by way of deposition.

On March 27, 1987, Judges James O. Ellison and Thomas R. Brett again toured the three facilities comprising the Tulsa City-County Jail.

In this lawsuit and in reference to the compliance hearing the Plaintiffs question the constitutional operation of the jail in its totality, raising issues regarding security and staffing of the jail, the medical delivery system, and deterioration of sanitation and ventilation. Plaintiffs also assert the Defendant has not complied with the orders of the Court of February 15, 1985, and the Defendant's own plans. The Plaintiffs urge that due to the noncompliance the jail is operated unconstitutionally and is "beyond salvage."

After considering the evidence presented, the applicable legal authority, and the briefs of counsel, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The parties have stipulated to the following facts:

   A. The practice and procedures regarding visitation have remained substantially the same since August 2, 1983.

   B. Inmates being held solely on municipal charges are members of the Plaintiff class, as well as any and all inmates held on state charges in the Tulsa City-County Jail.

   C. The medical department of the Tulsa City-County Jail has been substantially upgraded and improved since July, 1983.

   D. The practices and procedures regarding access to courts have remained substantially the same since August 2, 1983. The Defendant has, however, increased the number of available law books since August 2, 1983.

2. A description of the Tulsa City-County Jail facilities is as follows:

The Tulsa County Jail consists of three facilities: the eighth and ninth floors of the Tulsa County Courthouse Building, built in 1956, the city jail in the Police Courts Building, built in 1969, which is adjacent to the Tulsa County Courthouse and connected by an enclosed ramp, built in 1982, and the Adult Detention Center, built in 1968, located approximately a mile and a half to the northwest. Male inmates are housed in all three facilities and female inmates are presently housed in a separate area of the ninth floor of the county facility.

The sheriff's office is on the first floor of the Tulsa County Courthouse Building. The center of the eighth and ninth floor jail operations is on the ninth floor, which is generally used for the confinement of women and D.O.C. trustees. The eighth floor is used to house more serious offenders and inmates who present a more severe management problem. The configuration of the eighth and ninth floors is an internal grouping of various sized cells, some with contiguous day-room space. Within the cell areas are toilets and shower facilities. The day-rooms are essentially extensions of the barred cell areas, and are furnished with tables used in part for dining. A walkway or "catwalk" runs around the outside perimeter of the cells. A central corridor and control office comprise the balance of the

useable space. Windows in the exterior walls provide some outside light.

The two floors of the county jail have substantially the same design. The guards' station is located on a central corridor towards the center of the building with a hallway leading to the elevators forming somewhat of a "T" configuration. This "T" is formed by a solid, steel bulkhead with several corridors leading back to the various tanks. There is no adequate visibility of the tanks from the guard's station. In 1983, there was only visibility into the tanks from "catwalks" running around the exterior walls of the building. Since that time, view windows have been installed in the main corridor for visual access to the tanks. Because the inmates could as easily see out of the the tanks as the guards could see in, wooden "blackboards" were recently added which block the inmates' view of the corridor. With the combined use of the catwalk and the view windows, there are a few areas of the cells which cannot be seen.

The City Jail facility is located on the second floor of the Municipal Building of the Civic Center, accessible to the County Building by an elevated, enclosed walkway. "A-Section", a group of twelve single cells used until shortly before the 1983 trial for holding medical and psychiatric cases, as well as

administrative segregation, is located in this facility. Four enlarged A-Section cells were again reopened after trial. The Defendant voluntarily closed A-Section during the compliance hearing. The facility also contains four other areas with internal groupings of multiple occupancy cells, with bunk space ranging from two to ten; a central corridor; a control office; processing area; medical staff office, kitchen, and group dining area. There are no windows providing natural light but artificial lighting is basically adequate. In these cells there are no day-room like areas.

The Adult Detention Center, a medium security facility, is a one-story brick building, encircled by an eight-foot cyclone fence, located on a large area of land. The building is designed with a central core and four wings. All of the wings house open dormitories. The control office in the central core has electronic control of the housing unit doors and a visual monitor of the rear entry. The outside fenced areas are suitable and used for outdoor recreation and exercise.

The Defendant Sheriff Frank Thurman operates the City of Tulsa facilities of the Tulsa County Jail System under a contract entered into on June 2, 1981, between Tulsa County, Oklahoma and the City of Tulsa, Oklahoma. The contract provides for the Tulsa County

Sheriff to be responsible for operating the overall jail facility. In September 1986, the Defendant also assumed responsibility for the booking of inmates into the facility.

3. Since the initial trial of this case in 1983, a number of major physical plant and operational changes have been made to the Tulsa City-County Jail. Approximately One Million Dollars ($1,000,000.00) has been expended by Tulsa County for capital improvements to the jail facility. These changes include the following:

A. Structural Changes.

1. Women inmates are provided space on the Ninth (9th) Floor of the County Facility which is reasonably comparable to the space provided to male inmates housed at the Adult Detention Center. A wall has been installed to divide the women's section of the jail from the rest of the floor. The door to the women's section has a one-way viewing window which allows the matron to look outside the women's section, but prevents anyone on the outside of the women's section from looking in. Additionally, metal panels have been installed on the viewguard panels within the women's section to prevent males from viewing females when the door to the women's section is open.

2. A wooden curtain has been installed in the medical facility on the Ninth (9th) Floor of the County Facility to insure the privacy of all inmates during medical examinations and consultations.

3. "T" tank on the Eighth (8th) Floor of the County Facility has been renovated and modified from a single dormitory style tank to six (6) cells consisting of four (4) - eight (8) man and two (2) - six (6) man cells. Each cell has a new stainless steel combination sink and toilet.

4. The medical records office has been moved from the City Jail to the Third (3rd) Floor

of the County Courthouse Building. The new office provides increased space for and greater confidentiality of inmates' medical records.

5. Plastic, shatter resistant viewguard panels have been installed on the Eighth (8th) and Ninth (9th) Floors of the County Facility to open up the bulkheads and increase the visibility of jailers into the inmates' living quarters.

6. A-Section at the City Facility has been completely renovated and currently consists of four one-person cells. Each cell is 8' x 12 1/2' wide and contains a poured concrete bunk approximately 2' above the floor, a standard American-style stainless steel toilet and combination sink and drinking fountain. Flanking the door to each cell are Plexiglass-type viewing windows to the main hallway. Newly installed light fixtures provide at least 20' candles when the cells are occupied. Shower facilities are nearby the A-Section cells. (A-Section has been closed for inmate occupancy by the Defendants).

7. Fire doors have been installed at either end of the walkway which connects the City and County Facilities.

8. Fire doors have been installed on the laundry and kitchen facilities of the Eighth (8th) and Ninth (9th) Floors of the County Facility.

9. The area of the Ninth (9th) Floor of the County Facility previously used as a property room has been converted into a short-term court holding cell containing six (6) bunks.

10. The area previously used as a dining facility at the Adult Detention Center has been renovated into three (3) - sixty (60) man cells. Inmates at the facility are now fed in a cell adjacent to their assigned dorm (Defendant's Exhibit 29-A).

11. Lighting has been substantially upgraded in most areas of the jail.

12. General sanitary and health conditions within the jail have been substantially upgraded.

13. Two (2) outdoor exercise yards have been constructed at the Adult Detention Center.

14. In addition to access to law books in the Tulsa County Law Library, a law library has been constructed on the Ninth (9th) Floor of the County Facility.

B. Operational Changes.

1. No males are permitted to enter the women's section until the matron on duty ensures that the women inmates are so informed.

2. Records are kept and maintained by the Tulsa County Sheriff's Office concerning the receipt into the jail system of all medication, both prescription and nonprescription. (Defendants' Exhibit Nos. 4, 5, 6-A, 6-B, and 10).

3. Individual medical records for each inmate are kept. (Defendants' Exhibit No. 8). Each individual medical record reflects the medication administered, to whom administered and by whom administered. Id. On all prescription medicines, this record also reflects the reason that the medication was given and whether the medicine was administered by order of a physician concerning an individual inmate or by protocol. Id.

4. Food carts have been purchased and are used in the County Facility to endeavor to keep inmates' food the proper temperature from the time it is put on the tray until it is delivered to the inmate in his/her cell.

5. Mobile pay telephones are now available to inmates for several hours per day.

6. Staffing within the medical department has been substantially upgraded. The medical staff now consists of a jail physician, a dentist for necessary dental care, seven (7) licensed practical nurses, eight (8) registered nurses, a medical supervisor, a medical records clerk and available psychiatrists.

7. A registered nurse conducts all medical screening upon inmates at the time they are booked into the facility.

8. Quarterly meetings are held by the jail physician with the medical staff.

9. Pursuant to the Jail Contract, referred to above, the Tulsa County Sheriff is now in charge of booking all inmates into the jail system.

10. Since February 15, 1985, staffing levels within the jail facility have been increased and each facility, as well as both floors of the County Facility, are, as a general rule, staffed with three (3) jailers. In those instances in which a staffing shortage occurs, deputies are called in from field service to make up the shortage.[2]

11. Pursuant to the Oklahoma Minimum Jail Standards, all deputies with the Tulsa County Jail are required to attend a minimum of twenty-four (24) hours of training during their first year of employment and at least twenty-four (24) hours of training each year thereafter. Deputies with the Tulsa County Jail currently receive, however, a minimum of forty (40) hours of jail training per year. The training program includes:

(a) Security procedures;

(b) Supervision of inmates;

(c) Report writing and documentation;

(d) Inmate rules and regulations;

(e) Grievance and disciplinary procedures;

(f) Right and responsibilities of inmates;

(g) Emergency procedures;

(h) First aid and CPR; and

(i) Requirements of the Minimum Inspection Standards for Oklahoma Jails. (See Minimum Inspection Standards

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2 The sheriff and jail staff demonstrates a genuine interest in the well being of the prisoners and sincerely maintains an open line of communications. Considering the outmoded design and construction of the facilities, the sheriff and jail staff does a commendable job of operating the jail.

for Oklahoma Jails, Defendant's Exhibit No. 17 at p. 20).[3]

12. Periodic fire drills are conducted two times per year at each jail facility and on each floor of the County Jail Facility following the evacuation plan outlined in the Jail Operating Manual. (Defendant's Exhibit No. 3, JOM #014). Each of these drills is reviewed by the State Fire Marshal. Additionally, the State Fire Marshal inspects the Tulsa County Jail at least annually.

13. Catwalk tours are made, on a random basis, approximately two to three times per hour.

14. Inmates incarcerated for more than thirty (30) days are given an opportunity to exercise outdoors, weather permitting.

4. Title 74 O.S. §192 requires the Oklahoma State Department of Health to inspect the Tulsa City-County Jail at least one time per year to ensure compliance with the Oklahoma Minimum Jail Standards. The State Department of Health has, however, been inspecting the Tulsa City-County Jail three (3) times per year. (Defendant's Exhibit Nos. 36-A, 36-B, and 36-C). Additionally, the State Department of Health has been reviewing the medical system of the Tulsa City-County Jail annually.

5. Since 1983, the Tulsa City-County Jail Facility is and has remained in substantial compliance with the Oklahoma Minimum Jail Standards.

6. The Tulsa City-County Jail Facility is in substantial compliance with the National Fire Protection Life Safety Code.

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3 At the time of trial, ninety-five percent (95%) of the deputies in the Tulsa County Jail had completed parts of this school. A majority of the deputies had totally completed the school.

7. The Tulsa City-County Jail has made reasonable efforts to operate the jail system within the 550 self-imposed population limit. However, such limit is often exceeded on weekends and then a variety of inmate release options are implemented to bring the population within the limit. When the jail population is at or near maximum capacity adherence to the classification system cannot be strictly maintained because of lack of flexibility.

This sporadic problem of inmate over-population exacerbates other problems within the jail. Thus, while the Court concludes that the jail operation meets constitutional standards, inmate crowding, coupled with the age and outmoded design of the jail, threatens long-term compliance with those standards.

8. Seventy-five percent (75%) to eighty percent (80%) of the inmates are housed in the jail less than seventy-two (72) hours. This is due to release by posting bail, the nature of the offense charged, or due to no formal charge being filed.

9. Classification of inmates upon their admission to the Tulsa City-County Jail System involves the following criteria:

a. Classification of inmates shall not be made on the basis of race, color, creed or national origins.

b. Inmates are classified when admitted to one of the county jail facilities to ensure the safety of the inmates and the jail staff.

c. An inmate's classification shall be reviewed:

(1) At the request of the Jail Director or Jail Physician.

(2) Following a court appearance.

(3) After drug-intoxicated inmates cease to be under the influence.

d. Juvenile inmates will be provided living quarters separate from adult inmates, although the quarters may be in the same structure.

e. Female inmates will be provided living quarters separate from male inmates, although the quarters may be in the same structure.

In addition, classification is made according to these categories:

- age
- type of offense
- legal status (sentenced, unsentenced, material witness
- evidence of homosexuality or vulnerability to attack
- past history of violent or hostile behavior
- intoxication

(Tulsa County Jail Operating Manual, JOM #029, Defendant's Exhibit No. 3). This classification system substantially complies with not only the Oklahoma Minimum Jail Standards, but also the American Correctional Association's Standards for Adult Local Detention Facilities, 2nd Edition.

10. Relative to the specified constitutionally deficient areas in the Court's Findings of Fact and Conclusions of Law filed August 2, 1983, and referred to previously herein in the Introduction on page 2, the Court finds the following:

A. EQUAL PROTECTION - FEMALE INMATES

When this lawsuit was tried in 1983, women inmates were housed in an area of the City Jail Facility. These inmates were not provided any type of dayroom space and did not have any access to natural lighting. Since the trial of this matter, however, female inmates were moved and are now housed on the Ninth (9th) Floor of the County Facility. This facility provides women inmates with natural lighting, dayroom space and square footage space on a substantially similar basis as the facilities provided male inmates.

A wall has been installed to divide the women's section from the rest of the Ninth (9th) Floor. Specifically, the door to the women's section has a one-way viewing window which allows the matron to ascertain the identity of any individual prior to allowing them to enter the women's section, thereby preventing male inmates and/or officers from being able to see into the women's cells. Additionally, metal panels have been installed on the viewguard windows within the women's section. These panels are perpendicular to the viewguard windows, yet parallel to the door leading into the women's section, thus preventing any individuals from looking into the women's cells when the door to this section is open. Further, no men are allowed into the women's section of the jail until the matron informs the women inmates that a man is entering the section. All of these measures were taken to ensure the privacy of women inmates while using the shower and toilet facilities.

The space currently provided on the Ninth (9th) Floor of the County Jail for women inmates is substantially equal to the space provided male inmates. Specifically, both male and female inmates are provided a minimum of thirty (30) square feet of floor space.

For security reasons, trustee jobs for women are limited to those jobs which become available within the women's section of the jail. Since the trial of this case in 1983, women trustees have been assigned to trustee jobs on a substantially equal basis with male trustees. (See Tulsa County Jail Operating Manual, JOM #209, Defendant's Exhibit No. 3, for trustee eligibility criteria.) Legitimate security considerations, however, prevent precisely equal treatment of male and female trustees.

While Defendant has substantially complied with the Court's Order of August 2, 1983 in this area, the Defendant should endeavor to grant more equal trustee asignments to females, with records maintained in this regard.

B. MEDICAL

The inmate population is subject to the same mental and physical illnesses as the general population. However, the incidence of inmate illness is increased because of such factors as close confinement, tension and stress, their lifestyle occasionally involving drug abuse, and their being more subject to traumatic injury due to exposure to and increased risk of assaultive behavior.

The jail medical staff consists of a physician qualified in the general practice of medicine, seven (7) licensed practical nurses, eight (8) registered nurses, a dentist, a psychiatric program coordinated through the Oklahoma University-Tulsa Medical College, a medical records clerk, and a medical supervisor.

Before an inmate is accepted/booked into the Tulsa City-County Jail System, a registered nurse fills out a medical screening form on the individual, including basic medical information and medical history. (Defendant's Exhibit No. 8). If the individual appears to need immediate medical attention, the arresting officer is advised to transport the individual to a nearby hospital. If, however, no emergency is apparent, the individual is booked into the jail system. At the time of booking, each inmate is provided an inmate handbook which includes information on how to receive medical care within the Tulsa City-County Jail. (Defendant's Exhibit No. 30).

Inmates have regular daily access to medical care by filling out a sick-call slip and turning the slip in to one of the jail nurses. Additionally, jail security personnel may place an individual on the physician's patient list if they believe the inmate needs medical attention. Also, inmates may request emergency medical treatment by notifying the medical staff through a jailer. (Id). Once an inmate requests medical care, a separate medical record for that inmate is maintained under the physician's direction and supervision. (Defendant's Exhibit No. 8).

The jail physician is present a minimum of two (2) hours per day, seven days per week at the three facilities and is available twenty-four (24) hours a day for emergency calls. The jail dentist visits the jail facility one time per week for the purpose of conducting a dental screening to ascertain the extent of an inmate's dental problems and/or to schedule an appointment for the inmate to be taken to the dentist's office for treatment. The jail dentist is also available on a twenty-four (24) hour basis for emergencies.

Inmates also can request psychiatric care or can be referred to a psychiatrist by the jail physician. Personnel within the jail can also make referrals to the psychiatrist on a priority basis. The psychiatric program is conducted and coordinated by the University of Oklahoma-Tulsa Medical College. Licensed medical doctors attending the college and completing a residency program in psychiatry visit the jail facility approximately six (6) hours per week; on Mondays, Wednesdays and Thursdays approximately two (2) hours per day. They work under and are directly supervised by the Director of the University Psychiatric Residency Program. Inmates are evaluated by resident psychiatrists who diagnose and recommend treatment. The resident psychiatrists can recommend hospitalization where indicated. The psychiatric residents are on call twenty-four (24) hours per day. All inmates with serious psychiatric problems are seen on a priority basis. The priorities are: (1) Emergency or suicidal persons overtly demonstrating psychotic tendencies as well as

persons on specific medications that need to be followed; (2) persons showing signs of mental illness but not requesting psychiatric assistance; and (3) persons not showing objective signs of distress but having subjective signs of distress such as anxiety, depression, insomnia, etc. Priority (1) receive attention in the psychiatric program but Priority (2) often do not and a program is being developed to better identify them. Priority 3 often go unassisted but some are seen by the jail physician.

Additionally, private physician specialists are available by way of referral from the jail physician. A gynecologist is included on the referral physicians list. Further, a financially able inmate may have his or her own personal physician visit the facility upon request.

The medical staff under the supervision of the jail physician is responsible for the storage and dispensing of prescription medication within the jail system. As a general rule, the jail physician writes a prescription for an inmate. The prescription is then taken to the Tulsa County Social Services Pharmacy to be filled. (Defendant's Exhibit Nos. 6-A, 6-B, and 9). In those instances where the social services pharmacy is closed, the jail nurses can obtain the most frequently prescribed medications from jail stock bottles.

Special medical diets are provided when prescribed by the jail physician. The jail menus are approved by licensed dietitians. (Defendant's Exhibit No. 3, JOM #013).

The Tulsa City-County Jail Facility still operates under arrangements made with the Oklahoma Osteopathic Hospital for emergency treatment and hospitalization of inmates, where necessary.

The jail physician reviews the medical system on a quarterly basis. His review includes a review of the effectiveness of the health care delivery system, areas of the health care delivery system which need improvement, and changes in the health care delivery system since the last quarter. (Defendant's Exhibit Nos. 1-A through 1-I). Additionally, the jail physician reviews and reports to the Sheriff on any inmate's medical grievances and/or attempted suicides. (Id.)

Further, the State Department of Health, pursuant to this Court's Order of February 15, 1985, reviewed the effectiveness of the health care delivery system within the Tulsa City-County Jail on April 12, 1985, and April 15, 1986. (Defendant's Exhibit Nos. 2-A and 2-B).

Plaintiffs have isolated a few cases over a period of years, both medical and psychiatric, in which attention to that particular patient's problem was not what should have been or could stand improvement. However, such isolated instances do not support a general deficiency in the Defendant's medical program.

Basically, the Tulsa City-County Jail medical program meets or exceeds constitutional standards. The following areas, however, need continuing attention and improvement:

(1) In-house physician review of medical policies, procedures and grievances;

(2) Written medical operating policy;

(3) Periodic audit of medical program and procedures by a qualified outside person or agency;[4]

(4) Maintain daily medication logs and records concerning medication issued to various jail facilities from central medical storage; and

(5) Psychiatric program and policy that will permit earlier identification and treatment of Priority 2 inmates and treatment of the more serious Priority 3 inmates.

(6) Use of restraints only for security or medical purposes and then with medical supervision.

C. PRISONER SECURITY

(1) Physical Security.

The Defendant has increased the staffing levels not only at the County Facility, but also at the Adult Detention Center. Since February 15, 1985, the Ninth (9th) Floor of the County Facility has been staffed twenty-four (24) hours per day with a Sergeant and two (2) jailers, and the Eighth (8th) Floor of the County Facility has been staffed twenty-four (24) hours per day with three (3) jailers. Additionally, plexiglass viewguard panels have been installed throughout the Eighth (8th) and Ninth (9th) Floors of the County Facility, thereby increasing visibility from the hallways into the inmates' cells. Also, since February 15, 1985, the Adult Detention Center has been staffed with three (3) jailers.

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[4] The Tulsa City-County Jail medical system is seeking accreditation by the National Commission on Correctional Health Care (Affidavit of Undersheriff Art Lee filed 7-2-87).

Further, the Defendant has made a concerted effort to stress to his employees the importance of random catwalk tours approximately three to four times an hour, evidenced by time clock discs. Occasionally, the tours have not been made every fifteen (15) or twenty (20) minutes, but at such times the jailer was otherwise occupied in the cell areas.

The results of the Defendant's efforts in this area indicate improved security. Since February, 1985, the record reflects that the incidents within the Tulsa City-County Jail are not only less serious in nature but also, are responded to by the jail staff more timely. Further, the level of efficiency and security at which the jail operates despite its antiquated design is directly attributable to staff training and efforts. (Plaintiffs' Exhibit No. 33 at p. 14).

Continuing attention should be directed to:

(1) Appropriate staffing of each facility, including the women's facility;

(2) Conduct of and recording of catwalk tours;

(3) Adherence to established classification procedures.

(2) Fire Detection, Prevention and Evacuation.

Since 1983, the fire safety within the Tulsa City-County Jail Facilities has been substantially upgraded. The Defendant has employed a state-certified firefighter as Fire Inspection Officer. The responsibilities and duties of this officer are to make weekly inspections within the jail system to look for and correct deficiencies within the facilities in terms of fire safety.

The Operating Manual for the Tulsa County Jail (Defendant's Exhibit No. 3) contains policies and procedures for fire prevention and inspection (JOM #002), fire and evacuation plans for all three facilities (JOM #014), a facility fire plan (JOM #16), and emergency ventilation plans (JOM #s 024-A, 024-B and 024-C). The facilities are equipped with smoke alarms, fire extinguishers and air masks. Further, the jail facility is currently in substantial compliance with the National Fire Protection Life Safety Code.

Additionally, each jailer receives yearly training in the evacuation of the facilities and the use of emergency fire equipment. The Fire Inspection Officer is also available to jail staff should any questions arise concerning the fire safety procedures within the jail.

Fire drills are conducted four (4) times per year at each facility. These drills are scheduled in such a way that all deputies participate and trustees also participate.

The State Fire Marshal inspects the jail on a yearly basis, including a review of all fire drill reports. A detailed written report is sent to the Sheriff within four to six weeks of the Fire Marshal's inspection detailing the results of the inspection. The Defendant has implemented procedures to correct deficiencies. Due to the location and outdated design of the Tulsa County jail facility, continuing attention must be given to prompt evacuation in the event of fire.

D. DUE PROCESS -- A-SECTION

A-Section at the City Facility has been completely renovated. See Finding of Fact No. 5(A)(6). Since the renovation of A-Section, the primary use of these cells has been to house inmates with contagious diseases. Additionally, the cells have, at times, been used to house inmates who could not get along in the general population.

Following the testimony of Dr. Goodman, a psychiatrist within the Tulsa City-County Jail System, the Sheriff issued a memorandum stating that A-Section was being closed and would no longer be used to house inmates. In the event that an inmate within the Tulsa City-County Jail is suspected or diagnosed as having a contagious disease, he is to be placed in the hospital. (Defendant's Exhibit No. 40).

Renovated A-Section should not be used for permanent housing of inmates. (Dr. Goodman's testimony, page 23). It could be employed for temporary placement or holding, not to exceed 36 hours.

E. PHYSICAL EXERCISE.

The completion of two (2) outdoor recreation facilities at the Adult Detention Center provide appropriate space for inmates incarcerated for more than thirty (30) days to exercise. Once incarcerated for more than thirty (30) days, an inmate is eligible to participate in the exercise program, unless said inmate is classified as an escape risk or has had his/her exercise rights suspended in a disciplinary action. At the time

F. RELIGION.

Inmates still have free access to personal visitation by ministers, priests or authorized representatives of recognized religious groups. Group religious services are held approximately three (3) times per week for approximately one (1) hour each time at the Adult Detention Center. Additionally, group bible services are held for women inmates three (3) times per week for approximately one (1) hour each time in the women's section of the County facility. For legitimate reasons, group services are not held for inmates incarcerated in the remaining portions of the jail facilities. Group religious services for women on the Ninth Floor of the Tulsa County Jail should be implemented insofar as space is available and security considerations permit. Records regarding religious services should be maintained.

11. The Defendant has made improvements in the area of sanitation, facilities maintenance, food service and lighting. Each of these areas, however, require persistent continuing attention to maintain acceptable standards. Maintaining reasonable sanitation, facilities maintenance and lighting is made more difficult by the design and age of the jail structure. As previously stated, each inmate should be provided a clean mattress.

12. The Court concludes the Tulsa City-County Jail is in substantial compliance with the Court's Orders of August 2, 1983 and February 15, 1985. Further, the overall operation of the

Tulsa City-County Jail, though limited in its capacity and outmoded in design and construction, comports with the requirements of the United States Constitution in the areas of racial segregation, women's rights, visitation, use of mails, access to the courts and legal materials, medical, prisoner security, due process, recreation and exercise, and religion.

13. On July 21, 1987, the voters of Tulsa County voted 57.1% to 42.9% in favor of constructing a new jail which had the potential of housing slightly in excess of 1,000 inmates. Since a 60% majority was required for passage, the bond issue vote failed.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter under 42 U.S.C. §1983 and 28 U.S.C. §1331.

2. This action was properly certified as a class action by the Court pursuant to Fed.R.Civ.P. 23(c) on December 7, 1981. The Court found that the class should consist of the named plaintiffs, all present inmates of the Tulsa County Jail and all inmates to be confined in the future in the Tulsa County Jail.

3. Any Finding of Fact properly characterized as a Conclusion of Law is incorporated herein.

4. Federal Courts are properly reluctant to interfere with the operation of state correctional systems. Procunier v. Martinez, 416 U.S. 396, 404-05 (1974); Cruz v. Beto, 405 U.S. 319, 321 (1972); Pell v. Procunier, 417 U.S. 817, 825-26 (1974). The federal courts do not sit as co-administrators of state system. Bounds v. Smith, 430 U.S. 817, 832 (1977). The inquiry of federal courts into prison management must therefore be limited to the issue of whether a particular system violated any prohibition of the United States Constitution. Bell v. Wolfish, 441 U.S. 520, 562 (1979).

5. A policy of judicial restraint, however, "cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." Procunier v. Martinez, supra, at 405-06.

6. Lawful incarceration necessarily operates to deprive a prisoner of certain rights and privileges he would otherwise enjoy in a free society. Price v. Johnston, 334 U.S. 266, 285 (1948); Courtney v. Bishop, 409 F.2d 1185, 1187 (8th Cir. 1969), cert. denied, 396 U.S. 915 (1969); Brown v. Wainwright, 419 F.2d 1376, 1377 (5th Cir. 1970); Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968). Nevertheless, "there is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Prisoners retain all those rights enjoyed by free citizens except those necessarily lost as an incident of confinement. Pell v. Procunier, 417 U.S. 817, 822 (1974).

7. The Eighth Amendment to the United States Constitution provides that cruel and unusual punishment shall not be inflicted. The United States Supreme Court has recognized the words of the amendment are not precise and that their scope is not static. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-01 (1958). The Eighth Amendment has been held to prohibit conditions which involve "the unnecessary and wanton infliction of pain..." Estelle v. Gamble, 429 U.S. 97, 102 (1976) and proscribes penalties "that are grossly disproportionate to the offense...as well as those that transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity and decency.'" Hutto v. Finney, 437 U.S. 678, 685 (1978).

8. There is no doubt that the conditions of confinement can cause a constitutional violation under the Eighth and Fourteenth Amendments. Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). As the Rhodes court noted: "Prison conditions could be cruel and unusual when they 'deprive inmates of the minimal civilized measure of life's necessities,' 452 U.S. at 347, 101 S.Ct. at 2399, or when they result in punishments that 'involve' the unnecessary and wanton infliction of pain, . . . or are grossly disproportionate to the severity of the crime.' Id. at 346, 101 S.Ct. at 2399 (citations omitted). French v. Owens, 777 F.2d 1250 (7th Cir. 1985). See Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986). Because conditions of confinement are part of the penalty imposed upon criminal offenders, they too fall within the ambit of the Eighth Amendment. Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986), citing, Whitley v. Albers, ____ U.S. _____, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986).

9. When assessing the constitutionality of conditions, each condition need not be weighed separately, but we instead look to "the totality of conditions." Alberti at 1224. Conditions which "alone or in combination ... deprive inmates of the minimal civilized measure of life's necessities ... could be cruel and unusual under the contemporary standard of decency." Rhodes at 347, 101 S.Ct. at 2399, Alberti at 1223, Caldwell at 6001. See also, Ramos v. Lamm, 639 F.2d 599 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Basically, courts have found

the "minimal civilized level of life's necessities" to be conditions in the categories which this Court discussed in 1983, such as equal protection, visitation, mail, access to courts, medical, prisoner security, due process, physical exercise and religion. Cody v. Hillard, 599 F.Supp. 1025 (D. S.D. 1984); Miles v. Bell, 621 F.Supp. 51 (D.C.Conn. 1985). The effect of the "totality" test is that this Court can order the improvement of any single factor, whether or not that factor alone is unconstitutional, in order to ensure that the entire system, in its totality, meets constitutional standards. See Ramos, 639 F.2d at 566, Doe v. District of Columbia, 701 F.2d 948 (D.C.Cir. 1983), Battle v. Anderson, 564 F.2d at 393, Cody, 599 F.Supp. at 1060.

10. As this case involves Fourteenth Amendment Due Process violations, it is affected by the recent Supreme Court decisions in Daniels v. Williams, ____ U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and Davidson v. Cannon, ____ U.S. ____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). These two cases "explain that no deprivation of the due process clause results from the negligent act or omission by an official causing unintentional injury to life, liberty, or property. Daniels, 106 S.Ct. at 663, Davidson, 106 S.Ct. at 670-71." New v. City of Minneapolis, 792 F.2d 724 (8th Cir. 1986). Violations of the due process clause require a showing equivalent to the mental state required for a violation of the Eighth Amendment ban on cruel and unusual punishment, that is, a showing of recklessness or deliberate indifference. Davidson, 88 L.Ed.2d at 689, citing, Estelle.

11. The effect of Daniels and Davidson on the present suit is that the Sheriff of Tulsa County must be at fault, or culpable, in some sense, in the maintenance of a policy or custom that violates the Constitution. Jones v. City of Chicago, 787 F.2d 200, 203 (7th Cir. 1986).

> "[T]he Supreme Court in Daniels and Davidson did not change the rule that intentional abuse of official power, which shocks the conscience or which infringes a specific constitutional guarantee such as those embodied in the Bill of Rights, implicates the substantive component of the due process clause . . ."

Wilson v. City of North Little Rock, 801 F.2d 316 (8th Cir. 1986), citing New, supra, at 725. Historically, due process protections only have been afforded with regard to deliberate decisions of government officials. Franklin v. Aycock, 795 F.2d 1253, 1261 (6th Cir. 1986). Hence, Daniels and Davidson pose no bar to the present case if it is found that the Sheriff has deliberately operated a facility which violates the Constitution.

12. The Fourteenth Amendment incorporates and makes applicable to the states the Eighth Amendment's prohibition of cruel and unusual punishment. In addition, it safeguards the due process rights of pre-trial detainees, proscribing conditions and practices affecting pre-trial detainees which are punitive. Bell v. Wolfish, 441 U.S. at 538. The Fourteenth Amendment also guarantees equal protection of law regardless of race or gender.

13. Various Oklahoma statutes govern operation of the Tulsa County Jail. The county, by authority of the Board of County Commissioners, is required to maintain the jail. 57 Okl.St.Ann.

§41. The judges of the state district courts are responsible for promulgating rules for the regulation and government of the jail. 57 Okl.St.Ann. §43. The sheriff is responsible for daily operation of the jail. 57 Okl.St.Ann. §47.

EQUAL PROTECTION

(RACIAL SEGREGATION --FEMALE INMATES)

14. Racial Discrimination--A state may not constitutionally require segregation of public facilities. Johnson v. State of Virginia, 373 U.S. 61, 62 (1963). This principle extends to all public facilities, including penal facilities. Washington v. Lee, 263 F.Supp. 327, 331 (N.D. Ala. 1966), aff'd. Lee v. Washington, 390 U.S. 333 (1966). Prison officials cannot resort to acts of racial discrimination in administration of a prison. Rivers v. Royster, 360 F.Supp. 592, 594 (4th Cir. 1966); Battle v. Anderson, 376 F.Supp. 402, 420-21 (E.D.Okl. 1974). Racial segregation does not now exist in the Tulsa County Jail. Racial segregation is prohibited at any time in the future.

15. Female Inmates--The standard for review of the constitutionality of sex-based classification was established in Craig v. Boren, 429 U.S. 190, 197 (1976):

> "To withstand constitutional challenge, previous cases establish that classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

Courts faced with allegations of sex discrimination in correctional institutions apply a 'parity of treatment' standard to which the state is held in treatment of female inmates.

Batton v. State Government of North Carolina, 501 F.Supp. 1173, 1176-77 (E.D.N.C. 1980). In other words, defendants are obligated to provide women inmates with treatment and facilities substantially similar to those provided the men--"i.e., equivalent in substance if not in form -- unless their actions bear a fair and substantial relationship to achievement of the state's correctional objectives." Glover v. Johnson, 478 F.Supp. 1075, 1079 (E.D.Mich. 1979). Educational, vocational, recreational and work opportunities which exist in a prison must be made available to all inmates on an equal basis. Barnes v. Government of Virgin Islands, 415 F.Supp. 1218, 1226 (V.I. 1976).

As stated in the Court's Findings of Fact, the Defendant is in substantial compliance with the Constitution in providing trustee job assignments to women reasonably equal to men consistent with legitimate security considerations, and in providing substantially equivalent housing for male and female inmates. Also, the privacy now provided female inmates complies with the Court's Order of August 2, 1983.

MEDICAL

16. As we have previously held herein, the Eighth Amendment protects Plaintiffs from a "deliberate indifference to their serious medical needs." Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The Eighth Amendment requires the State to "make available to inmates a level of medical care which is reasonably designed to meet the routine and emergency health care needs of inmates." Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980).

Accidental or inadvertent failure to provide adequate medical care, or negligent diagnosis or treatment of a medical condition does not constitute a violation of the Eighth Amendment.

In order to show "deliberate indifference to serious medical needs," there must be evidence that prison or jail officials have prevented an inmate from receiving recommended treatment or that they have denied access to medical personnel capable of evaluating the need for treatment. Id. Such has not been the case herein.

Psychiatric.

Psychological or psychiatric conditions can be as serious as any physical pathology or injury, especially when it results in suicidal tendencies. Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986).

Protection of inmates from themselves is an aspect of the broader constitutional duty to provide medical care for inmates. Id. at 1187. See also: Guglichmoni v. Alexander, 583 F.Supp. 821, 827 (D. Conn. 1984).

The Oklahoma Mental Health Laws, 43A O.S. §§1-101 et seq., enacted to ensure that persons in need of mental health treatment would receive adequate treatment (43A O.S. §1-104), set out statutory procedures which must be followed before an individual may be committed to a mental facility. Further, the United States Supreme Court has held that the involuntary transfer of a state prisoner to a mental hospital implicates a liberty interest

that is protected by the due process clause of the Fourteenth Amendment. Vitek v. Jones, 445 U.S. 480, 63 L.Ed.2d 552, 100 S.Ct. 1254 (1980). Specifically, the court said:

> "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that '[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.' Also, '[a]mong the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'
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> * * *
>
> "Were an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause. We conclude that a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital. Id. at L.Ed.2d 564-65."

It is clear that a pretrial detainee would be entitled, at a minimum, to the same procedural rights as a convicted felon. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Thus, inmates within the Tulsa City-County Jail have the right, prior to any transfer to a mental facility to the procedural protections afforded under Oklahoma's mental health laws.

An inmate is, however, "entitled to psychological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that

the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial. The right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable." Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). See also, Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981).

In deciding the level of psychiatric care mandated by the Constitution, this Court must be guided by the oft-stated principle that, in the end, the provision of medical care to prisoners is a matter of sound professional judgment. Bowring at 48.

Based upon these standards, the Court concludes the medical system within the Tulsa City-County Jail System is constitutional.

PRISONER SECURITY

17. "While occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment, confinement in a prison where violence and terror reign is actionable. A prisoner has a right, secured by the Eighth and Fourteenth Amendments, to be reasonably protected from constant threat of violence and sexual assault by fellow inmates, and he need not wait until he is actually assaulted to obtain relief."

Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (4th Cir. 1973) [citations omitted].

18. The test for unconstitutional prisoner security conditions is "(1) whether there is a pervasive risk of harm to inmates from other prisoners, and, if so, (2) whether the officials are exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm." Id. at 890.

19. A pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidents, but it may be established by much less than proof of a reign of violence and terror in the particular institution. Withers v. Levine, 615 F.2d 158, 161 (4th Cir. 1980), cert. denied, 449 U.S. 849 (1980).

The Court concludes the Tulsa City-County Jail comports with constitutional standards since the placement of viewing panels, increased staffing and inmate observation tours. The nature of the design and construction of the facilities of the Tulsa City-County Jail as well as the general character of the inmate population require vigilance in this regard, however.

CLASSIFICATION OF INMATES

20. Federal courts are properly reluctant to limit the freedom of prison officials to classify prisoners as they, in their broad discretion, see fit. Marchesani v. McCune, 531 F.2d 459, 461 (10th Cir. 1976), cert. denied, 429 U.S. 846. This Court, therefore, declines to intervene in the classification system of the Tulsa County Jail.

The Defendant should, however, endeavor to adhere to its stated classification system and maintain an inmate population that permits reasonable adherence thereto.

OVERCROWDING

21. There is no overcrowding claim per se herein. This Court cannot make a set standard of square feet per inmate which would, if met, constitutionalize the Tulsa County Jail. See Smith v. Fairman, 690 F.2d 122 (7th Cir. 1982), cert. denied, 461 U.S. 946, 103 S.Ct. 2125, 77 L.Ed.2d 1304 (1983), Burks v. Walsh, 461 F.Supp. 454 (W.D.Mo. 1978), aff'd Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979). This Court can, however, assess whether the total space for each inmate, in combination with other circumstances, is constitutional.[6]

The Court does not find there is a constitutional violation when the total space per inmate in combination with other circumstances is considered.

22. Fire Safety - Fire protection is a basic necessity of life. Battle v. Anderson, 447 F.Supp. 516, 526 (E.D.Okl. 1977). Thus, fire prevention, detection and evacuation are matters of inmate security and well-being about which the jail must have a sound policy. The level of fire safety and the fire safety policy of the Tulsa City-County Jail is adequate.

6 The Tenth Circuit, in Battle, 564 F.2d 388, adopted as the constitutional minimum the standards of the American Public Health Association of 60 square feet per inmate in a cell and 75 square feet per inmate in a dormitory. This ruling was implicitly overruled by the Supreme Court in Rhodes, 452 U.S. 337, where it was suggested that district courts refrain from overreliance on an expert opinion as to prison capacity. However, the use of such guidelines is not prohibited, and such may be used where supported by independent evidence. See, Cody, 801 F.2d at 451.

DUE PROCESS

23. The "A-Section" cell as renovated provides inmates incarcerated therein with the "basic elements of hygiene." Novak v. Beto, 453 F.2d 661 (5th Cir. 1971). However, for the reasons stated by Defendant's psychiatrist, Dr. Goodman, "A-Section" should be employed for temporary housing only, as provided in the Findings of Fact.

Relative to administrative segregation, if an inmate is deprived of rights available to other prisoners, records should be kept as to why the deprivation occurred.

PHYSICAL EXERCISE

24. Although sophisticated recreational programs for inmates are not required, the right to reasonable opportunities of exercise for those incarcerated in excess of 30 days is fundamental, especially where jail life for most inmates is characterized by idleness and prolonged daily confinement in their cells. Ramos v. Lamm, 485 F.Supp. 122, 158 (D.Colo. 1979), aff'd in part 639 F.2d 559, cert. denied, 450 U.S. 1041 (1981), on remand, 520 F.Supp. 1059 (1981).

25. An important factor in determining inmates' need for regular exercise is the size of their cells, the amount of time spent locked in their cells each day, and the overall duration of confinement. Ruiz v. Estelle, 679 F.2d 1115, 1152 (5th Cir. 1982). The Fifth Circuit Court of Appeals has held that inmates incarcerated for a period of time exceeding 30 days should be given adequate opportunity for exercise and recreation. Smith v.

Sullivan, 553 F.2d 373, 379 (5th Cir. 1977). The Court in its Order of August 2, 1983, concludes that inmates confined in the Tulsa County Jail for more than 30 days must be given an opportunity for exercise and recreation. The Defendant has implemented a plan substantially complying with the Court's Order.

RELIGION

26. In Pell v. Procunier, 417 U.S. 817, 41 L.Ed.2d 495, 94 S.Ct. 2800 (1974), the Court held that in the First Amendment context a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. The right to free exercise of religion does not abate upon incarceration. Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 3199, 82 L.Ed.2d 393 (1984). The Court recognized, however, that the institutional consideration of internal security was central to all other penological objectives. Bell v. Wolfish, 441 U.S. 520, 546-547, 99 S.Ct. 1861, 1877-78, 60 L.Ed.2d 447 (1979).

Legitimate security considerations preclude jail officials from conducting group religious services at the City and County Facilities. Where, however, security risks are minimal, the Defendant has held group religious services. Additionally, since inmates are allowed free access to priests, rabbis, ministers, and other authorized representatives of recognized religious groups (Finding of Fact No. 10F), this Court concludes that the policies and practices of the Tulsa City-County Jail regarding religion are constitutional.

TOTALITY OF CONDITIONS

27. The question before this Court is whether the conditions within the Tulsa City-County Jail are "sufficiently shocking" to amount to the cruel and unusual punishment that is proscribed by the Eighth Amendment. Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986); Ramos v. Lamm, 485 F.Supp. 122, 158 (D. Colo. 1979), aff'd in part, set aside in part 639F.2d 559, cert. denied, 450 U.S. 1041 (1981), on remand, 520 F.Supp. 1059 (1981).

In making this determination, we must recognize as so eloquently stated in Battle v. Anderson, supra, at 1426, that to the extent we are dealing with a large, confined population of individuals who are not only awaiting trial, but in many instances have repeatedly shown an inability to get along in the civilized world, ". . . there will always be problems and inadequacies." When an institution furnishes inmates with adequate food, clothing, shelter, sanitation, medical care, and personal safety, its obligations under the Eighth Amendment are satisfied. Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978).

In analyzing a challenge to jail conditions based upon the Eighth Amendment, a court should examine each challenged condition to determine whether that condition is compatible with "the evolving standards of decency that mark the progress of a maturing society. (citations omitted) Any condition of confinement which passes this test is immune from federal

intervention. If no challenged condition fails to meet the test, the entire facility and its administration are immune from Eighth Amendment attack." Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981). See also, Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982).

Although the Tulsa City-County Jail Facility is antiquated and the structural design is obsolete, this Court holds that inmates are provided with the basic necessities required by the Eighth Amendment. The Defendant has substantially complied with all of this Court's orders herein.

In the case at bar, the Defendant has generally, with the help of various individuals within the judicial system of Tulsa County, maintained the jail population on the eighth (8th) and ninth (9th) floors of the county facility at what in the Defendant's expertise and professional judgment was the reasonable maximum capacity of that facility - 250. Additionally, the Tulsa City-County Jail has remained in substantial compliance with the Oklahoma Minimum Jail Standards (Finding of Fact No. 5.) Therefore, based upon the foregoing and the Court's own knowledge of the current conditions within the Tulsa City-County Jail, this Court holds that the conditions of confinement in the Tulsa City-County Jail are not in their totality unconstitutional.

Further, based upon the Defendant's extensive improvements to the Tulsa City-County Jail System, general compliance with the Court's Orders of August 2, 1983, and February 15, 1985, and the cooperative and concerted efforts of various individuals and

organizations within the Tulsa County Criminal Justice System, this Court hereby concludes that the Tulsa City-County Jail system complies with constitutional standards.

A separate Judgment in keeping with the Findings of Fact and Conclusions of Law dismissing Plaintiffs' action shall be entered this date.

IT IS SO ORDERED, this 10th day of Sept., 1987.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JIMMY ARLEN JONES,

Petitioner,

v.

LARRY MEACHUM and the Attorney General of the State of Oklahoma,

Respondents.

87-C-712-B

FILED

SEP 10 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

Petitioner Jimmy Arlen Jones' application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is now before the court for consideration. Petitioner pled guilty to the crime of Robbery with a Firearm in Tulsa County District Court, Case No. CRF-82-1796, and was sentenced to twelve (12) years imprisonment. Petitioner did not file a direct appeal from his conviction and sentence. Nor did he seek leave to file a late appeal. Petitioner's application for state habeas corpus relief, originally filed in the Oklahoma Supreme Court, was transferred to the Court of Criminal Appeals, which has jurisdiction over all criminal matters.

In his habeas petition Jones alleged that he was being illegally incarcerated because he was sentenced to imprisonment in the Oklahoma State penitentiary system at a time when a federal district court had declared the Oklahoma prison system to be unconstitutional. On June 18, 1987, the Court of Criminal Appeals summarily denied the petition for habeas corpus, finding that petitioner had failed to state sufficient grounds for issuance of the writ. Case No. H-87-421.

Petitioner now seeks federal habeas corpus relief asserting three grounds for relief. The first ground is the same argument rejected by the Court of Criminal Appeals: that the trial judge subjected him to cruel and unusual punishment by sentencing him to incarceration in the Oklahoma prison system.

In Battle v. Anderson, 376 F.Supp 402 (E.D.Okl. 1974), the district court ruled that the conditions in the Oklahoma prison syustem violated the constitutional proscription against cruel and unusual punishment. Following that decision, the U. S. District Court for the Eastern District of Oklahoma continued to monitor the conditions in Oklahoma prisons and the progress that had been made in bringing these facilities into constitutional compliance. See, Battle v. Anderson, 447 F.Supp. 516 (E.D.Okl. 1977), aff'd 564 F.2d 388 (10th Cir. 1977); Battle v. Anderson, 457 F. Supp. 719 (E.D.Okl. 1978), remanded for further hearings, 594 F.2d 786 (10th Cir. 1979). In 1983 the Tenth Circuit found that the Oklahoma prison system met constitutional standards. Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983). At no time during this period of inspection and supervision did the federal district court, or the Tenth Circuit, forbid the State of Oklahoma from continuing to sentence inmates to incarceration in Oklahoma prisons. Petitioner's first ground for habeas relief is without merit.

Petitioner's second contention is that the Court of Criminal Appeals violated his constitutional rights to Due Process and Equal Protection of Law by summarily denying his petition for habeas corpus relief without making specific findings of facts

and conclusions of law on the merits of his claim. Section 2254(a) provides that a federal district court may consider an application for a writ of habeas corpus on behalf of a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. Because petitioner's second claim does not address the constitutionality of his confinement, it is not reviewable under §2254.

Likewise, petitioner's third claim, that the State Supreme Court violated petitioner's constitutional rights by failing to retain jurisdiction over his habeas corpus application, does not attack the constitutionality of his incarceration, and is therefore not cognizable under §2254.

For the above reasons, it is hereby Ordered that petitioner's application for a writ of habeas corpus be dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

It is so Ordered this 11th day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. GERALD E. BAIN; GWENDOLYN M. JEFFERSON; AVCO FINANCIAL SERVICES, INC.; STATE OF OKLAHOMA ex rel. DEPARTMENT OF HUMAN SERVICES; THE FOURTH NATIONAL BANK OF TULSA; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	CIVIL ACTION NO. 87-C-217-B

FILED

SEP 10 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10th day of September, 1987. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, appear by their attorney Robert A. Todd; the Defendant, Avco Financial Services, Inc., appears not, having previously filed its Disclaimer; the Defendant, State of Oklahoma ex rel. Department of Human Services, appears by its attorney Bruce Walker; the Defendant, The Fourth National Bank of Tulsa, appears by its attorney Douglas S. Tripp; and the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Doris L. Fransein, Assistant District Attorney, Tulsa County, Oklahoma.

The Court being fully advised and having examined the file herein finds that the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, acknowledged receipt of Summons and Complaint on April 27, 1987; that Defendant, State of Oklahoma ex rel. Department of Human Services, acknowledged receipt of Summons and Complaint, April 27, 1987; that Defendant, The Fourth National Bank of Tulsa, acknowledged receipt of Summons and Complaint on April 15, 1987; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 30, 1987; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 31, 1987.

It appears that the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, filed their Answer on April 27, 1987; that the Defendant, Avco Financial Services, Inc., filed its Disclaimer on June 23, 1987; that the Defendant, State of Oklahoma ex rel. Department of Human Services, filed its Answer on July 6, 1987; that the Defendant, The Fourth National Bank of Tulsa, filed its Answer on April 16, 1987; and that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers herein on April 20, 1987.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Fourteen (14), Block Forty-five (45), VALLEY VIEW ACRES SECOND ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on May 19, 1983, the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of $30,500.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated May 19, 1983, covering the above-described property. Said mortgage was recorded on May 20, 1983, in Book 4692, Page 2409, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, are indebted to the Plaintiff in the principal sum of $30,198.81, plus interest at the rate of eleven and one-half percent (11.5%) per annum from May 1, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title, or interest in the subject real property.

The Court further finds that the Defendant, Avco Financial Services, Inc., disclaims any right, title, or interest in or to the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Department of Human Services, claims some right, title, or interest in the subject real property by virtue of a Default Judgment against Gerald E. Bain in the amount of $14,255.00 in Case No. FD 86-3087. Said judgment was dated July 16, 1986 and recorded on July 24, 1986 in Book 4957, Page 2380 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, The Fourth National Bank of Tulsa, claims some right, title, or interest in and to the subject real property by virtue of a real estate mortgage executed by the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, in favor of Fourth National, on the 27th day of June, 1984, and filed of record in the office of the County Clerk of Tulsa County, Oklahoma, on the 3rd day of July, 1984, in Book 4801, Page 1737 of the real estate records of said county. Said mortgage secures an original principal indebtedness of $3,695.10, and there is now due and owing by the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, to Fourth National, the sum of $665.05, representing the remaining principal balance and accrued interest through April 15, 1987, together with

interest accruing thereafter at the rate of 21 cents per day until paid.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, in the principal sum of $30,198.81, plus interest at the rate of eleven and one-half percent (11.5%) per annum from May 1, 1986 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Avco Financial Services, Inc. and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Department of Human Services, have and recover judgment in the amount of $14,255.00, plus interest and costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, The Fourth National Bank of Tulsa, have and recover judgment in the amount of $665.05 representing the remaining principal balance and accrued interest through April 15, 1987, together with interest accruing thereafter at the rate of 21 cents per day until paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, The Fourth National Bank of Tulsa, in the amount of $665.05, representing the remaining principal balance and accrued interest through April 15, 1987, together with interest accruing thereafter at the rate of 21 cents per day until paid.

Fourth:

In payment of the Defendant, State of Oklahoma ex rel. Department of Human Services, in the amount of $14,255.00, plus interest.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PHIL PINNELL
Assistant United States Attorney

ROBERT A. TODD
Attorney for Defendants,
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GWENDOLYN M. JEFFERSON
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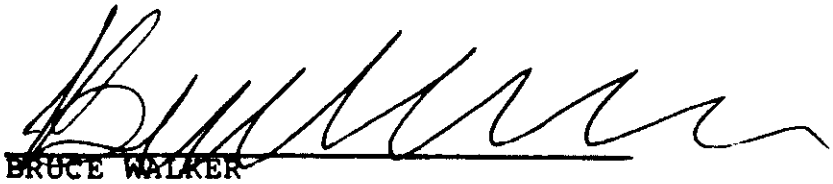
Tulsa, Oklahoma 74126



BRUCE WALKER
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State of Oklahoma ex rel.
Department of Human Services
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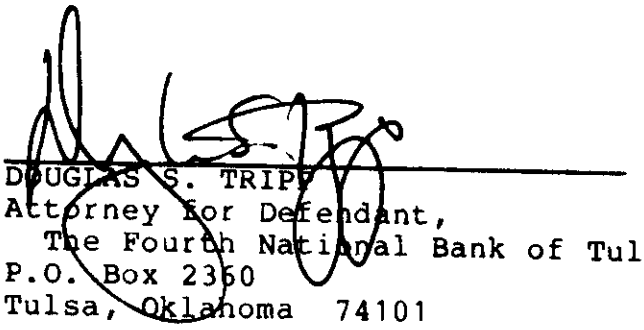

DOUGLAS S. TRIPP
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DORIS L. FRANSEIN
Assistant District Attorney
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County Treasurer and
Board of County Commissioners
Tulsa County Courthouse
Tulsa, Oklahoma 74103

PP/css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES E. CLAYTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 79-C-723-B
	)	
FRANK THURMAN, Sheriff of Tulsa County, Oklahoma, et al.,	)	
	)	
Defendants.	)	

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law (Compliance Hearing) entered this date, Judgment is hereby entered in favor of the Defendant and against the Plaintiffs and the action is dismissed. Any motion to tax costs should be filed in accordance with Local Rule. The hearing concerning Plaintiff's application for attorney fees is set for the 16th day of September, 1987, at 1:30 P.M.

DATED this 10th day of Sept, 1987.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J. TOWNLEY PRICE,

Plaintiff,

vs.

THE OKLAHOMA COLLEGE OF OSTEOPATHIC MEDICINE AND SURGERY; THE BOARD OF REGENTS OF THE OKLAHOMA COLLEGE OF OSTEOPATHIC MEDICINE AND SURGERY; THOMAS J. CARLILE; FRED D. CORMACK; FANNIE HILL; SIMON D. PARKER; R. JEANNE ROUSH; WALTER L. WILSON; LEONA R. LIMON; JOHN BARSON; JACK R. WOLFE; SUE MCKNIGHT; and ROBERT C. RITTER,

Defendants.

Case No. 85-C-600-E

JOINT STIPULATION OF DISMISSAL

COME NOW the parties, by and through their undersigned attorneys of record, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure dismiss with prejudice the above-styled cause of action.

FRASIER & FRASIER

By: _____

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ATTORNEYS FOR PLAINTIFF

-and-

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McCORMICK, ANDREW & CLARK
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ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAY PETROLEUM, INC., a corporation,

Plaintiff,

v.

MOBIL OIL CORPORATION, a Corporation,

Defendant.

No. 86-C-952-B

FILED

SEP - 9 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiff May Petroleum, Inc.'s motion to strike Defendant Mobil Oil Corporation's Third-Party Complaint against Transok, Inc. For the reasons outlined in the attached Order filed July 15, 1987, in Dyco Petroleum Corporation v. Mobil Oil Corporation, No. 86-C-883-B, the motion to strike is hereby sustained.

IT IS SO ORDERED, this 9th day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DYCO PETROLEUM CORPORATION, a corporation,

Plaintiff,

v.

MOBIL OIL CORPORATION, a New York corporation,

Defendant and Third Party Plaintiff,

v.

TRANSOK, INC.,

Third Party Defendant.

No. 86-C-883-B

FILED

JUL 15 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

O R D E R

These matters come before the Court on the Plaintiff Dyco Petroleum Corporation's ("Dyco") application for leave of court to dismiss without prejudice Count Three of the Amended Complaint and Defendant Mobil Oil Corporation's ("Mobil") motion for leave to file a third-party complaint.

The Court finds no objection has been asserted by the Defendant Mobil Oil Corporation to the application to dismiss Count Three of the Plaintiff's Amended Complaint without prejudice and the Court therefore grants the Plaintiff's application.

Turning to Mobil's motion for leave to file a third-party complaint, the Court finds that the Defendant has failed to satisfy the requirements of Fed.R.Civ.P. 14 and therefore the motion is denied.

33

In the Defendant's reply to the Plaintiff's brief in opposition to the motion to file a third-party complaint, the Defendant asserts that leave of court is not required to file a third-party complaint under Fed.R.Civ.P. 14. However, Fed.R.Civ.P. 14(a) provides that leave of court is required if the third-party Plaintiff seeks to make service of a third-party complaint later than 10 days after he served his original answer. The Court notes that the proposed third-party Defendant, Transok, Inc., ("Transok") has filed with the court a brief in opposition to the third-party complaint. While Fed.R.Civ.P. 14 does not provide for such a filing by the proposed third-party defendant, the Court will allow said filing in the interest of justice. Hensley v. United States, 45 F.R.D. 352 (D.Mont. 1968), and State Mutual Life Assur. Co. v. Arthur Andersen & Co., 65 F.R.D. 518, 519 (S.D.N.Y. 1975).

Mobil's application to add third-party defendant Transok, is based upon a contract entered into on October 3, 1977, between Mobil and Transok, Inc., wherein Mobil committed gas it purchased from wells in Canadian, Caddo and Grady Counties of Oklahoma to Transok, Inc., for a period of twenty years. Mobil asserts that on May 21, 1981, it entered into an agreement with the Plaintiff Dyco to purchase gas from the Plaintiff from the Deskins No. 1-19 well with the understanding that said gas was committed to Transok pursuant to the contract dated October 3, 1977. Mobil asserts that if found liable to Dyco for the failure to pay for gas allegedly not taken, then Transok will be derivatively or

secondarily liable to Mobil for the alleged failure to take the case from the Dyco Deskins No. 1-19 well. Mobil alleges Transok's secondary liability, but offers no explanation of how Transok's liability is dependent upon the outcome of the primary claim. A review of the filings in this case makes it clear that Transok is not liable to the Plaintiff Dyco under its contract with Mobil, and any liability of Transok to Mobil will be predicated on a separate contract between those parties. As explained in Lambert v. Inryco, Inc., 569 F.Supp. 908 (W.D.Okla. 1980), the following requirements are necessary to implead under Rule 14(a):

> "...The original defendant's claim against the third-party defendant cannot simply be an independent or related claim but must be based upon the plaintiff's claim against the original defendant. . . . The crucial characteristic of a Rule 14 claim is that the original defendant is attempting to transfer to the third-party defendant the liability asserted against him by the original plaintiff." 569 F.Supp. at 911.

The Court finds that the Defendant Mobil's proposed third-party complaint against Transok is an independent claim which lacks the presence of derivative or secondary liability as required by Rule 14(a). Therefore Mobil's motion for leave to file a third-party complaint is denied.

IT IS SO ORDERED, this 14th day of July, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MILO ENERGY COMPANY,
a Partnership,

Plaintiff,

vs.

BIG JACK OIL & GAS, INC.,
a Kansas corporation, and
JERRY W. LINE, SR.,

Defendant.

Case No. 87-C-716-B

FILED

SEP - 9 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

PRELIMINARY INJUNCTION

THIS MATTER came on for hearing on the 2nd day of September, 1987, on Plaintiff's Motion for a Preliminary Injunction, after entry of a Temporary Restraining Order by this Court on August 28, 1987, Plaintiff appearing by its counsel, Bert C. McElroy and John L. Randolph, Jr., and Defendants appearing by their counsel, Davis S. Carson and Russell Carson, and the Court, having heard statements of counsel in the matter, finds that an agreed Preliminary Injunction be entered enjoining and restraining the Defendants, their representatives and employees from entering the Subject Property or taking any action with respect thereto, during pendency of this action and until further order of this Court.

The Court further finds that Plaintiff should take appropriate action to shut down operations on the Subject Property pending further order of this Court. Immediately thereupon, an agreed Preliminary Injunction is hereby entered enjoining and restraining Plaintiff, its representatives and employees, from entering the

Property or taking any further action with respect thereto, during pendency of this action and until further order of this Court.

The Court further finds that the $5,000 bond placed by Plaintiff with the Court Clerk shall remain in place pending further order of this Court.

IT IS SO ORDERED.

S/ THOMAS R. BRETT

JUDGE THOMAS R. BRETT
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
OKLAHOMA

APPROVED:

Bert C. McElroy
OBA # 5974
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
900 Oneok Plaza
Tulsa, OK 74103
(918) 584-4136
Attorney for Plaintiff

Davis S. Carson
The Hartford Legal Associates
Suite 111, Hartford Building
110 South Hartford Avenue
Tulsa, OK 74120

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SUSAN A. REID,

Plaintiff,

vs.

GARY A. BURTON and ANGELA D. BURTON d/b/a 71st AND SHERIDAN LIQUOR STORE,

Defendants.

Case No. 87-C-671 B

STIPULATION FOR DISMISSAL

COMES NOW the Plaintiff, by and through her undersigned attorney of record, and dismisses the above-styled cause of action with prejudice.

McCORMICK, ANDREW & CLARK
A Professional Corporation
Attorneys for Plaintiff
Suite 100, Tulsa Union Depot
111 East First Street
Tulsa, Oklahoma 74103
(918) 583-1111

By: _____
Stephen L. Andrew (OBA# 294)

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on this 9th day of September, 1987, I caused to be mailed a true and correct copy of the above and foregoing Stipulation for Dismissal to Mr. Roy Hinkle, 1515 E. 71st St., Suite 307, Tulsa, Oklahoma 74136, with proper postage affixed thereto.

_____
Stephen L. Andrew

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MOBILRADIO, INC., Plaintiff,	)	
v.	)	No. 87-C-220-B
GENERAL ELECTRIC COMPANY, Defendant.	)	

O R D E R

This matter comes before the Court on the Plaintiff's motion to reconsider filed July 22, 1987. Plaintiff asks the Court to reconsider its order dated July 13, 1987, which transferred the instant action to the United States District Court for the Southern District of Texas, Houston Division, pursuant to 28 U.S.C. §1404. For the reasons set forth below, the Plaintiff's motion to reconsider is overruled.

The parties agree that the burden of establishing whether a suit should be transferred under §1404(a) is upon the movant and unless the evidence and circumstances of the case are strongly in favor of the transfer, the Plaintiff's choice of forum should not be disturbed. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Wm. A. Smith Contract. Co., Inc. v. Travelers Indem. Co., 467 F.2d 662, 664 (10th Cir. 1978). Plaintiff urges in its motion to reconsider that the Court erroneously shifted the burden to the Plaintiff in evaluating the motion for transfer. While poorly articulated, the Court applied the correct standard in ruling on the motion to transfer by order dated July 13, 1987.

The Plaintiff relies heavily on the case of ROC, Inc. v. Progress Drillers, Inc., 481 F.Supp. 147 (W.D.Okla. 1979), for the proposition that the transfer of the case to the Southern District of Texas would merely shift the inconvenience from the Defendant to the Plaintiff and therefore the motion should be denied. In ROC, the court recognized the proposition that a plaintiff's choice of forum has "reduced value" where there are no significant contacts with the forum. However, in ROC the court denied transfer to the United States District Court for the Southern District of Texas because the transfer would have shifted the inconvenience from one party to the other. The instant dispute has considerations that distinguish it from the decision in ROC.

Unlike the Plaintiff in ROC, the Plaintiff's cry of inconvenience is unpersuasive in light of the fact that Plaintiff has its principal place of business in Texas and its office in Rosenburg, Texas, a community located in the Southern District of Texas. Equally suspect is Plaintiff's argument that although no Oklahoma witnesses are to be called in this action, that the Texas witnesses consider the Oklahoma forum just as convenient as Houston.

In reviewing the factor under §1404(a) of the parties' convenience, the Court finds that the Plaintiff is entitled to little deference in his forum selection. As stated previously in the transfer order, Jacobs v. Lancaster, 526 F.Supp. 767 (W.D.Okla. 1981), made clear that the convenience of parties

factor has reduced value where there is an absence of any significant contact by the forum state with the transactions or conduct underlying the cause of action. See, Jacobs at 769. In the instant case, Plaintiff's only connection with this forum is its choice of Tulsa counsel and unrelated business dealings conducted by its president in Tulsa. The cause of action arises out of the allegation that General Electric Company ("GE") prevented the sale of radio equipment to Dow Chemical Company ("Dow") at Dow's Freeport, Texas plant, which is located in the Southern District of Texas. Plaintiff seeks commissions for the aborted sale. Defendant's local office involved in the matters alleged in the complaint is located in Houston, Texas.

The second factor under §1404(a) is the convenience of the witnesses. The Defendant identified certain party and nonparty witnesses it expected to testify at trial by affidavit attached to their original motion to transfer. (See Affidavit of Flossie Stephens Evans). No Oklahoma witnesses are identified in the affidavit. By way of rebuttal the Plaintiff has introduced the affidavits of the three nonparty witnesses, employees of Dow Chemical Company, which show the willingness of three nonparty witnesses to come to Tulsa, Oklahoma, to testify if the trial is held in Oklahoma. The willingness of the nonparty witnesses to come to Tulsa to testify is important. However, the Court would have no way to compel the attendance of such witnesses in the event they become unwilling to come to Tulsa to testify. See, Koenecke v. Greyhound Lines, Inc., 289 F.Supp. 487 (W.D.Okla.

1968). It is clear that the great bulk of witnesses are available for trial in the Southern District of Texas and such forum would have available compulsory process for witnesses and would be less expensive for the Texas witnesses identified by the Defendant's affidavit.

The third consideration under §1404(a) is the interest of justice. The Court re-adopts its evaluation of the third factor in the July 13, 1987 order.

For the reasons articulated in the original transfer order and the reconsideration above, the Court finds that the Defendant GE has sufficiently established that this action should be transferred to the Southern District of Texas. The motion to reconsider is overruled. The Court hereby orders this case be transferred to the United States District Court for the Southern District of Texas.

IT IS SO ORDERED, this 9th day of September, 1987.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHALLENGER MINERALS, INC., a California corporation,	)	
Plaintiff,	)	
vs.	)	No. 84-C-357-E
SOUTHERN NATURAL GAS COMPANY, a Delaware corporation,	)	
Defendant.	)	

JUDGMENT

This action came on for trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues as to liability having been duly tried and a decision having been duly rendered in favor of the Plaintiff, Challenger Minerals, Inc., and against the Defendant, Southern Natural Gas Company,

IT IS ORDERED AND ADJUDGED that the Plaintiff, Challenger Minerals, Inc., recover damages from the Defendant, Southern Natural Gas Company in an amount to be determined hereafter by subsequent proceedings.

DATED this 9th day of September, 1986.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHALLENGER MINERALS, INC., a California corporation,	)	
Plaintiff,	)	
vs.	)	No. 84-C-357-E
SOUTHERN NATURAL GAS COMPANY, a Delaware corporation,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to the Court sitting without a jury on November 4 through 8, 12, and 14, 1985, on the issue of the liability of the Defendant, Southern Natural Gas Company ("Southern Natural"), to the Plaintiff, Challenger Minerals, Inc. ("Challenger"). After considering the testimony and exhibits presented, as well as the briefs and arguments of the parties, the Court announced its decision from the bench on April 7, 1986. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court hereby renders its written findings of fact and conclusions of law in further support of that decision.

FINDINGS OF FACT

Jurisdiction and Venue

1. The Plaintiff, Challenger, is a corporation incorporated

under the laws of the State of California, whose principal place of business is located in the State of Texas.

2. The Defendant, Southern Natural, is a corporation incorporated under the laws of the State of Delaware, whose principal place of business is located in the State of Alabama.

3. The amount in controversy exceeds $10,000.00.

4. In its Answer to Plaintiff's Amended Complaint, Southern Natural admits that it has waived any objection to venue being laid in the United States District Court for the Northern District of Oklahoma.

Contract Terms and Performance

5. Southern Natural is an interstate natural gas pipeline company which operates over 8,500 miles of pipeline and two underground gas storage reservoirs.

6. On or about November 19, 1981 Southern Natural and Amoco Production Company entered into a Gas Sales and Purchase Agreement ("the Amoco Agreement") whereby Southern Natural agreed to purchase natural gas from wells in Blaine, Caddo, Custer, and Washita counties in the State of Oklahoma, which are located in an area designated by Exhibit B to the Amoco Agreement as the "Weatherford Area."

7. "Take or pay" provisions are contract clauses which

require that the purchaser either take delivery of a given volume of gas, or make payment for that given volume of gas, even if not taken.

8. The Amoco Agreement provides that Southern Natural must take or pay for at least 80% of the deliverability of each of the wells in the designated area each month, and must take or pay for 90% of the deliverability of these wells annually.

9. The Amoco Agreement provides that Southern Natural shall pay the difference every thirty days between the monthly minimum amount of natural gas which it is required to take and the quantity of natural gas actually taken. It also provides that if Southern Natural has paid for the gas, it can take it at any time within five years with no further payment, unless the price of the gas has increased in the interim.

10. Under the provisions of the Amoco Agreement, the price to be paid for the natural gas prior to deregulation is the highest applicable maximum lawful price allowed under the Natural Gas Policy Act of 1978. The price payable upon deregulation of natural gas is the highest of the following:

    (a) $6.02 per MMBTU commencing July, 1981, and escalating each month thereafter by the applicable escalation factor provided in Section 102(b) of the Natural Gas Policy Act of 1978;

    (b) A price per MMBTU equivalent to 110% of Fuel Oil No. 2; or

    (c) A price determined by averaging the highest of the two highest prices for natural gas being paid by

interstate pipelines to producers of natural gas in the State of Oklahoma.

11. The Amoco Agreement contains a force majeure clause, drafted by Southern Natural, which provides as follows:

SECTION E - FORCE MAJEURE

In the event of either party hereto being rendered unable, wholly or in part, by force majeure to carry out its obligations under this agreement, other than to make payments due for gas delivered hereunder, it is agreed that, on such party giving notice and full particulars of such force majeure in writing or by telephone (followed by written confirmation) or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period; and such cause shall as far as possible be remedied with all reasonable dispatch, provided, however, that no party hereto shall be required against its will to adjust any labor dispute.

The term "force majeure" shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lighting, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for maintenance of or making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such terms shall likewise

include the inability of either party to acquire, or delays on the part of such party in acquiring at reasonable cost, and by the exercise of reasonable diligence, servitudes, rights of way grants, permits, permissions, licenses, certificates issued by the Federal Energy Regulatory Commission, materials or supplies which are required to enable such party to fulfill its obligations hereunder.

12. The Amoco Agreement contains a choice of law clause which provides that it is governed by the law of the United States and the State of Oklahoma.

13. On or about January 29, 1982 Challenger and Amoco entered into a letter agreement whereby, in exchange for payment by Challenger of approximately $55,000,000.00, Amoco assigned working interests to Challenger in certain oil and gas leaseholds in the Weatherford Area covered by the Amoco Agreement with Southern Natural.

14. Southern Natural has paid Challenger for all gas actually taken from the Weatherford wells.

15. Since November 1, 1983, Southern has made no payments to Challenger other than for gas actually taken.

16. Since mid-1985 Southern Natural's takes have been limited to 5% to 10% of the deliverability of the Challenger wells.

17. Challenger has performed all of its obligations and duties under the Amoco Agreement.

Commercial Impracticability and Frustration of Purpose

18. Shortly after passage of the Natural Gas Policy Act of 1978, the United States began to experience an

oversupply of natural gas. This "gas bubble" continued to grow until in 1982 the oversupply of natural gas in the United States exceeded a trillion cubic feet, reaching a peak magnitude of 2.5 to 3.5 trillion cubic feet in 1983.

19. Factors causing or contributing to the oversupply of natural gas in the United States included the following:

(a) the deregulation of well-head gas prices pursuant to the National Gas Policy Act of 1978;

(b) the drilling boom which occurred in 1979-1982;

(c) a decline in the price of fuel oil in 1981-1982;

(d) a "decoupling" or disassociation of fuel oil and natural gas prices;

(e) an economic recession in 1981-1982;

(f) increased conservation by natural gas consumers;

(g) fuel-switching by natural gas consumers; and

(h) increased competition between natural gas pipelines, including increased use of transportation and special marketing programs and direct sales of gas to end users by producers.

20. The risk of a medium to long term oversupply of natural gas was recognized by several gas industry analysts and reported in the trade press prior to Southern Natural's execution of the Amoco Agreement in 1981.

21. The risk of medium to long term oversupply of natural gas was also recognized by some natural gas pipelines during 1980 and 1981. During this period between 30% to 50% of the gas purchase agreements signed contained "market out" provisions giving the pipelines the option of lowering the applicable price of gas or terminating

the agreement if the market price of natural gas fell below the contract price.

22. Prior to deregulation of natural gas in 1985, the price of natural gas was controlled. As a result, natural gas pipelines competed with each other to obtain natural gas from producers by offering more favorable take or pay clauses. An additional area of competition among pipelines was whether the contract would contain a "market out" clause allowing the pipeline to terminate the contract or renegotiate the price of the gas if the market price of natural gas dropped below the contract price.

23. Another reason for use of the take or pay contracts between natural gas producers and natural gas pipelines is to insure a secure market for the producer's gas. Otherwise, producers would be hesitant or unable to make the financial investment necessary to discover and develop natural gas. Thus, some risk of fluctuation in the market is inherently borne by a pipeline when a take or pay contract is employed without a "market out" clause.

24. Amoco selected Southern Natural's gas purchase agreement from several other pipeline's proposed contracts primarily because the Southern Natural Agreement did not contain a "market out" clause.

25. Challenger relied on the 90% annual deliverability take or pay clause in the Amoco Agreement in deciding to

participate with Amoco in the Weatherford area wells.

26. In 1981 Southern Natural projected that the demand for gas on Southern Natural's system would decline during the first four years of the term of the Agreement, and in 1981 Southern Natural was already experiencing an oversupply of natural gas.

27. Between 1981 and 1984, Southern Natural experienced a 25% drop in its sales, and projected a drop of 50% by 1986.

Oklahoma Natural Gas Conservation Statutes

28. Southern Natural has many sources of natural gas in addition to the wells involved in this action, and takes 100% of the lowest cost gas available from all sources before taking any higher cost gas.

29. Southern Natural treats the Challenger-Amoco wells as sources of high cost gas, and consequently takes less gas from the wells in question than it takes from its lower cost sources of gas.

30. Although Southern Natural began taking delivery of gas from the Weatherford area wells at 90% of deliverability, it decreased its takes until it was taking as little as 5% of deliverability.

31. No evidence was presented to prove that the Oklahoma Corporation Commission has entered any orders limiting production from the Challenger wells in question.

Maximum Price Allowable Under NGPA

32. 80% of the natural gas produced under the Amoco Agreement is unregulated Secion 107 gas. 20% of the natural gas produced is Section 102 gas, which was regulated until January 1, 1985.

33. Southern Natural will be unable to make up all of the natural gas which it agreed to take under the Amoco Agreement during the period prior to deregulation of natural gas prices.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332(a).

2. Although venue does not lie in this judicial district under 28 U.S.C. § 1391, any objection to improper venue was waived by the Defendant. 28 U.S.C. § 1406(b); Hoffman v. Blaski, 80 S.Ct. 1084, 363 U.S. 335, 4 L.Ed.2d 1254 (1960).

Sufficiency and Construction of the Contract

3. The Amoco Agreement is a valid and enforceable contract for the sale of goods as such term is defined in the

Oklahoma Uniform Commercial Code, 12A Okla.Stat. §1-101 et seq.; Southport Exploration, Inc. v. Producer's Gas Co., No. 83-C-550-B (N.D. Ok. June 1, 1984).

4. The letter agreement of January 29, 1982 executed by Challenger and Amoco is a valid and enforceable agreement. 15 Okla.Stat. §2 (1983).

5. With regard to the leases assigned from Amoco to Challenger, Challenger is entitled to enforce all rights which Amoco held under the Amoco Agreement at the time the leases were assigned to Challenger.

6. Any ambiguity in the Amoco Agreement must be construed against the party to the contract which drafted the ambiguous language. 15 Okla.Stat. §170 (1966).

7. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others. 15 Okla.Stat. §157 (1966).

8. Southern Natural has breached the Amoco Agreement with regard to those interests assigned to Challenger. Therefore Challenger is entitled to recover damages from Southern Natural for breach of contract.

Southern Natural's Affirmative Defense re:
Oklahoma Gas Conservation Statutes

9. The basis for the enactment of Oklahoma's gas conservation laws is to prevent waste and to protect correlative rights, Inexco Oil Co. v. Corporation

Commission, 628 P.2d 362 (Okl. 1981); Corporation Commission v. Phillips Petroleum Co., 536 P.2d 1284 (Okl. 1975); Anderson-Prichard Oil Corp. v. Corporation Commission, 252 P.2d 450 (Okl. 1953).

10. 52 Okla.Stat. §86.3 (1969) gives the Oklahoma Corporation Commission authority to make rules, regulations, and orders for the prevention of waste. This includes the authority to limit production of natural gas from a producing well to a percentage of the capacity of the well to produce.

11. The power of the Oklahoma Corporation Commission is limited to the power expressly granted by statute and that necessarily granted by implication. Carter Oil Co. v. State, 205 Okl. 541, 240 P.2d 787 (Okl. 1951).

12. The power of the Oklahoma Corporation Commission to prevent waste of natural gas does not give it power to invalidate contractual obligations between private litigants. Tenneco Oil Co. v. El Paso Natural Gas Co., 687 P.2d 1049 (Okl. 1984).

13. Enforcement of Southern Natural's take or pay obligation does not violate 52 O.S. §86.3 (1969). Southport Exploration, Inc. v. Producer's Gas Company, supra; Universal Resources Corporation v. Panhandle Eastern Pipeline Company, No. CA3-85-0723-R (N.D. Tex. Apr. 1, 1986).

14. Waste is defined by 52 O.S. § 86.3 (1969) as follows:

> The term "waste," as applied to gas, in addition to its ordinary meaning,

> shall include the inefficient or wasteful utilization of gas in the operation of oil wells drilled to and producing from a common source of supply; the inefficient or wasteful utilization of gas from gas wells drilled to and producing from a common source of supply; the production of gas in such quantities or in such manner as unreasonably to reduce reservoir pressure or unreasonably to diminish the quantity of oil or gas that might be recovered from a common source of supply; the escape, directly or indirectly, of gas from oil wells producing from a common source of supply into the open air in excess of the amount necessary in the efficient drilling, completion or operation thereof; waste incident to the production of natural gas in excess of transportation and marketing facilities or reasonable market demand; the escape, blowing or releasing, directly or indirectly, into the open air, of gas from wells productive of gas only, drilled into any common source of supply, save only such as is necessary in the efficient drilling and completion thereof; and the unnecessary depletion or inefficient utilization of gas energy contained in a common source of supply.

15. Economic waste is use of gas for inferior purposes. Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 71 S.Ct. 215, 95 L.Ed. 190 (1950).

16. Rule 1-101(56)(b) of the Oklahoma Corporation Commission Oil and Gas Rules defines waste exactly as waste is defined in 52 Okla.Stat. §86.3 (1969) except that economic waste is also specifically set forth in the Rule as a form of waste.

17. Rule 1-202(b) of the Oklahoma Corporation Commission Rules contains the following definition of waste:

> (b) Waste, in addition to its statutory and ordinary meaning, shall include but not be restricted to economic waste,

> underground waste, surface waste, and waste incident to the production of oil and gas in excess of the transportation or marketing facilities or reasonable market demand.

18. Waste is defined in 52 Okla.Stat. §237 (1969) as follows:

> The term waste, as used herein in addition to its ordinary meaning, shall include escape of natural gas in commercial quantities into the open air, the intentional drowning with water of a gas stratum capable of producing gas in commercial quantities, underground waste, the permitting of any natural gas well to wastefully burn and the wasteful utilization of such gas.

19. When a natural gas well is capable of producing gas in excess of market demand, 52 Okla.Stat. §239 (1969) limits production from a common source of supply of natural gas to the producer's pro rata share of that amount of natural gas which may be marketed without waste.

20. Waste, as defined in 52 Okla.Stat. §86.3 (1969), 52 Okla.Stat. §237 (1969) and Corporation Commission Rules 1-101(56)(b) and 1-202(b), does not include the payment of money pursuant to a take or pay contract. These statutes only address physical production or non-production of natural gas.

21. 52 Okla.Stat. §240 (1969) and Rule 1-305 of the Oklahoma Corporation Commission Rules have no application to a take or pay contract involving an interstate natural gas pipeline such as Southern Natural because state imposed ratable take requirements which require interstate

pipelines to purchase gas without discrimination as to producer or source of supply are preempted under the Natural Gas Policy Act of 1978. Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi, _____ U.S. _____, 106 S.Ct. 709, ____ L.Ed.2d _____ (1986).

22. Enforcement of Southern Natural's take or pay obligation to Challenger is not prohibited by 52 Okla.Stat. §86.3 (1969), 52 Okla.Stat. §239 (1969), 52 Okla.Stat. §240 (1969), Oklahoma Corporation Commission Rules 1-101(56)(b), 1-202(b), or 1-305.

Commercial Impracticability
and Frustration of Purpose

23. 12A Okla.Stat. §2-615(a) (1963) provides that delay in delivery or nondelivery by a seller is not a breach of contract if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.

24. The defense of commercial impracticability set forth in 12A Okla.Stat. §2-615(a) (1963) is also available to a buyer. International Minerals v. Llano, Inc., 770 F.2d 879 (10th Cir. 1985).

25. The defense of commercial impracticability does not relieve a party from performing under the contract if the eventuality which has occurred is the collapse of

the market for the goods. That is exactly the type of business risk which business contracts made at fixed prices are intended to cover. Official Comment 4 to U.C.C. §2-615; W. R. Grace and Co. v. Local Union 759, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983).

26. The defense of commercial impracticability does not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be among the business risks assumed under the dickered terms of the contract. Official Comment 8 to U.C.C. §2-615. Kansas, Oklahoma & Gulf Ry. Co. v. Grand Lake Grain Co., 434 P.2d 153 (Okl. 1967); Bernina Distributors, Inc. v. Bernina Sewing Machine Co., 646 F.2d 434 (10th Cir. 1981); Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F.Supp. 129 (N.D. Iowa 1978); Matter of Westinghouse Electric Corporation Uranium Contracts Litigation, 517 F.Supp. 440 (E.D. Va. 1981); Glidden Company v. Hellenic Lines, Limited, 275 F.2d 253 (2d Cir. 1960).

27. Although the parties may not foresee the precise eventuality claimed to excuse performance, an awareness that the marketplace is in flux and more than usually uncertain is sufficient to indicate that the party to the contract agreeing to be bound to a particular performance assumes the risk within the uncertain area. Electric Corporation Uranium Contracts Litigation, supra; Eastern Air Lines v. Gulf Oil Corp., 415 F.Supp. 429 (S.D. Fla. 1975).

28. Where the promisor can legitimately be presumed to have accepted some degree of abnormal risk of increase in the cost of performance, to excuse performance the unforeseen cost increase must be so great that it would be positively unjust to hold the parties bound to the contract. International Minerals and Chemical Corporation v. Llano, Inc., supra; Bernina Distributors, Inc. v. Bernina Sewing Machine Co., supra; Gulf Oil Corp. v. Federal Power Commission, 563 F.2d 588 (3rd Cir. 1977); L.A. Power & Light Company v. Allegheny Ludlum Industries, Inc., 517 F.Supp. 1319 (E.D. La. 1981); Transatlantic Financing Corp. v. United States, 124 U.S.App. D.C. 183, 363 F.2d 312 (D.C. Cir. 1966).

29. Because the purpose of the take or pay provision in the Amoco Agreement is to shift the risk of a decline in the market from Challenger to Southern Natural, and because the Amoco Agreement was negotiated at a time when all parties were aware that natural gas would be deregulated in 1985, it is not unjust to require Southern Natural to perform under the terms of its contract. Therefore, Southern Natural's performance is not relieved by 12A Okla.Stat. §2-615 (1963).

30. The doctrine of frustration of purpose is set forth in Section 265 of the Restatement of Contracts (Second)(1979) as follows:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the

> non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances indicate the contrary.

31. The principles regarding foreseeability and assumption of the risk applicable under the doctrine of commercial impracticability are also applicable to the doctrine of frustration of purpose. United States v. General Douglas MacArthur Senior Village, Inc., 508 F.2d 377 (2nd Cir. 1974); In the Matter of Westinghouse Electric Corporation Uranium Contracts Litigation supra.

32. Discharge under the doctrine of frustration of purpose has been limited to instances where a virtually cataclysmic, wholly unforseeable event renders the contract valueless to one party. United States v. General Douglas MacArthur Senior Village, Inc., supra.

33. For the reasons previously discussed regarding Southern Natural's assumption of the risk of a change or collapse in the natural gas market, the doctrine of frustration of purpose does not relieve Southern Natural from its obligation to perform under the Amoco Agreement.

Natural Gas Policy Act of 1978

34. The take or pay provisions of the Amoco Agreement do not violate the maximum price provisions of the Natural Gas Policy Act of 1978. Koch Industries, Inc. v. Columbia Gas Transmission Corporation, No. 83-990-A (M.D. La.

1985); Southport Exploration Inc. v. Producer's Gas Co., supra; Sid Richardson Carbon and Gasoline v. InterNorth, 595 F.Supp. 497 (N.D. Tex. 1984).

Public Policy

35. A court should refrain from enforcing a contract which violates an explicit public policy. Hurd v. Hodge, 334 U.S. 24, 69 S.Ct. 847, 92 L.Ed. 1187 (1948). Such a public policy must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. W. R. Grace and Co. v. Local Union 759, supra; Muschany v. United States, 324 U.S. 49, 65 S.Ct. 442, 89 L.Ed. 744 (1945).

36. Enforcement of the Amoco Agreement would not violate any explicit public policy.

Force Majeure

37. An oversupply of natural gas causing a drastic decline in its market price does not constitute an event which would relieve Southern Natural of liability under the force majeure clause of the Amoco Agreement. Monolity Portland Cement Co. v. Douglas Oil Co., 303 F.2d 176 (9th Cir. 1962); Kaiser-Francis Oil Co. v. Producer's Gas Co., No. 83-C-400-B (N.D. Ok. June 19, 1985).

Liquidated Damages

38. The take or pay provisions of the Amoco Agreement constitute an alternative means of performance, and do not constitute liquidated damages or illegal penalties under 12A Okla. Stat. §2-718 (1963) or 15 Okla. Stat. §214 (1966). Universal Resources Corporation v. Panhandle Eastern Pipeline Company, supra; 5 Corbin, Corbin on Contracts §1070 (1962).

Limitation of Remedies

39. The Amoco Agreement does not limit the right of the seller to assert a claim for damages if Southern Natural should fail to take or pay for gas as agreed therein.

DATED this 9TH day of September, 1986.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN STATES INSURANCE COMPANY,	)	
Plaintiff,	)	No. 84-C-908-C
vs.	)	
S. BOOKMAN AND ASSOCIATES, INC.; SAM BOOKMAN; and JERRY BOOKMAN,	)	
Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Comes the Plaintiff, American States Insurance Company, by its attorney of record, Jack Y. Goree of Goree, King, Rucker & Finnerty, and Defendants, S. Bookman and Associates, Inc., Sam Bookman and Jerry Bookman, appear by their attorney, John M. Freese, Sr. of Freese & March, and the parties advise the Court that all of the issues between the Plaintiff and these Defendants have been settled to the satisfaction of the Plaintiff and the Defendants, and a mutual release has been executed by the parties.

It is stipulated by the parties that this action of American States Insurance Company is hereby dismissed with prejudice to refiling of same.

GOREE, KING, RUCKER & FINNERTY

JACK Y. GOREE (OBA #3481)

By: _____
Attorney for Plaintiff

FREESE & MARCH

JOHN M. FREESE, SR.

By: _____
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of SEPT., 1987, a true and correct copy of the above and foregoing STIPULATION OF DISMISSAL WITH PREJUDICE was mailed to John M. Freese, Sr., Attorney at Law, 4510 East 31st Street, Tulsa, Oklahoma 74135; with sufficient postage thereon fully prepaid.

_____
Jack Y. Goree

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTHEASTERN, INC.; REGENT BUILDING CO.; EASTLAND, INC.; BILTWELL BUILDING CO., INC.; WELLBRO BUILDING CO., INC.; JAMES L. WELLS, an individual; C. G. WELLS and JEANNE WELLS, d/b/a J & J INVESTMENTS; SOUTHEASTERN, INC., d/b/a CADEUX, d/b/a EASTGATE INDUSTRIAL PARK, d/b/a CENTRAL PARK,	)	
Plaintiffs,	)	No. C-85-403-E
vs.	)	
AMERICAN STATES INSURANCE COMPANY, an Indiana corporation,	)	
Defendant,	)	
S. BOOKMAN & ASSOCIATES, INC.; SAM BOOKMAN; JERRY BOOKMAN; and S. BOOKMAN & ASSOCIATES,	)	
Third Party Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Comes Defendant/Third Party Plaintiffs, American States Insurance, by its attorney of record, Jack Y. Goree of Goree, King, Rucker & Finnerty; and the Third Party Defendants, S. Bookman & Associates, Inc., Sam Bookman, Jerry Bookman and S. Bookman & Associates, appear by their attorney, John M. Freese, Sr. of Freese and March, and the parties advise the Court that all of the issues between the Third Party Plaintiff and these Defendants have been settled to the satisfaction of the Third Party Plaintiff and the Defendants, and a mutual release executed by the parties.

It is stipulated by the parties that this action of Third Party Plaintiff, American States Insurance Company, is hereby dismissed with prejudice to refiling of same.

GOREE, KING, RUCKER & FINNERTY

JACK Y. GOREE (OBA #3481)

By: Jack Y. Goree
Attorney for American States Insurance Co.

FREESE & MARCH

JOHN M. FREESE SR

By: John M. Freese Sr.
Attorney for Third Party Defendants

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of SEPT., 1987, a true and correct copy of the above and foregoing STIPULATION OF DISMISSAL WITH PREJUDICE was mailed to the following, with proper postage thereon fully prepaid:

Robert O. Brooks
Attorney at Law
5310 East 31 Street
Suite 600
Tulsa, Oklahoma 74135-5014

John M. Freese, Sr.
Attorney at Law
4510 East 31st Street
Tulsa, Oklahoma 74135

Jack Y. Goree

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

REPUBLIC FINANCIAL CORPORATION, An Oklahoma Corporation,

Debtor.

R. DOBIE LANGENKAMP, Successor Trustee,

Plaintiff,

v.

RONALD DEAN DAVIS and SANDRA E. DAVIS,

Defendants.

Case No. 84-01460
(Chapter 11)

District Court
No. 87-C-34-C

Adversary No. 86-0753

ORDER

This matter comes before the court on defendants' Motion for Leave to Appeal from an Interlocutory Order of the United States Bankruptcy Court for the Northern District of Oklahoma. For the reasons set forth below, the Motion for Leave to Appeal is denied.

On October 29, 1986, the Trustee for Republic Financial Corporation ("RFC") filed an adversary complaint against defendants seeking to recover, under 11 U.S.C. §550, an alleged preferential transfer in the amount of $12,961.54. Defendants filed a motion to dismiss the complaint for failure to join an indispensable party, Gladys M. Oberbeck. Defendants also asserted that defendant Sandra E. Davis was improperly joined as a party. The Honorable Mickey D. Wilson entered an order on January 5, 1987, denying defendants' motion to dismiss.

6.

In denying defendant's motion, the Bankruptcy Court found as follows:

On January 12, 1984, RFC issued a six-month Money Market Thrift Certificate, #11101, in the amount of $24,000.00, at 12% per annum, to "Gladys M. Oberbeck or Ronald Dean Davis Jt Wros." At the maturity of the certificate, RFC paid the principal of $24,000.00 plus interest of $1,461.54, by issuing two checks on July 12, 1984, both to the order of "Gladys M. Oberbeck or Ronald Dean Davis Jt Wros." One check, #45398, in the amount of $25,000.00 is endorsed "Ronald Dean Davis". The other check, #45399, was in the amount of $461.54 and is endorsed "Gladys M. Oberbeck". For the purposes of the motion to dismiss, the Bankruptcy Court construed as being true defendants' assertion that on July 12, 1984, defendants entered into a promissory note with Gladys M. Oberbeck whereby they agreed to pay her the sum of $25,000.00, plus 11.5% per annum on July 12, 1987. Then, on July 19, 1984, RFC issued a three-month Money Market Thrift Certificate, #132660, in the amount of $12,500.00 at 12.75% per annum to "Ronald Dean or Sandra Earlene Davis".

In September, 1984, RFC filed its voluntary petition for relief under Chapter 11 of Title 11 U.S.C. The Trustee for RFC in his complaint against defendants Ronald Dean Davis and Sandra Earlene Davis asserts that RFC's July 12, 1984 payment of $25,461.54 was a preferential transfer; that defendants gave new value to RFC of $12,500.00 as evidenced by the second money market certificate, thereby reducing the preferential transfer by

that amount. Accordingly, the Trustee seeks to recover the "net preference" amount of $12,961.54.

The Bankruptcy Court rejected defendants' argument that Gladys M. Oberbeck's joinder was mandatory and that Sandra E. Davis was an improper party defendant. The court explained:

> Actions under 11 U.S.C. §547 are brought '...(b)...to avoid any transfer...(1) to or for the benefit of a creditor,' (emphasis added). Whether or not the $25,000 was transferred to Oberbeck, or to Ronald Dean Davis, or to either or both of them, clearly such transfer was primarily for the benefit of Ronald Dean Davis, or Sandra E. Davis, or both of them. Accordingly, both Ronald Dean Davis and Sandra E. Davis are proper parties defendant under 11 U.S.C. §547(b).
>
> . . . .
>
> If the transfer or any part of it is avoided under 11 U.S.C. §547, then under 11 U.S.C. §550 the Trustee '(a)...may recover...the property ...or...the value of such property, from--(1) the initial transferee of such transfer or the entity for whose benefit the transfer was made; or (2) any immediate or mediate transferee of such initial transferee,' (emphasis added). Accordingly, both defendants are proper parties defendant under 11 U.S.C. §550.

From Judge Wilson's order denying their motion to dismiss, defendants now seek leave to appeal.

Authority for the District Court to hear appeals from interlocutory orders is found at 28 U.S.C. §158, which provides in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving; and,

> (c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

Section 158 is silent as to what standard or considerations should be employed by the district court in determining whether leave to appeal should be granted.

Because bankruptcy appeals are to be taken in the same manner as appeals in civil matters, generally, the court finds the statutory provision governing interlocutory appeals from district courts to appellate courts should be applied. 28 U.S.C. §1292(b). See, In re Johns-Manville Corp., 47 B.R. 957 (S.D.N.Y. 1985). In general, exceptional circumstances must be present to warrant allowing an interlocutory appeal. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1977). Title 28 U.S.C. §1292(b) mandates three conditions requisite to an interlocutory appeal: (1) the existence of a controlling question of law; which (2) would entail substantial ground for differences of opinion; and (3) the resolution of which would materially advance the ultimate termination of the litigation.

The defendants have failed to satisfy any of these requirements. Thus, this court is compelled to deny the motion for leave to appeal.

Moreover, the likelihood of defendants prevailing on appeal, should this court give them leave to do so, is one consideration for the court in determining whether defendant should be given leave to appeal the action of the Bankruptcy Court. In In re

Den-Col Cartage & Distribution, Inc., 20 B.R. 645 (D.Colo. 1982), the court outlined the standards to determine when "the circumstances are extraordinary enough to warrant an interlocutory appeal." Id. at 648. According to the court, an interlocutory appeal should be allowed only when:

> (1) the appellant has demonstrated a substantial likelihood that he will eventually prevail on his appeal;
>
> (2) the appellant has demonstrated that the party he represents will suffer irreparable injury unless the interlocutory appeal is allowed;
>
> (3) the potential injury to the appellant's client if the appeal is not allowed outweighs the potential injury to other parties if the appeal is allowed; and
>
> (4) an interlocutory appeal is not adverse to either the public interest or the orderly administration of the Chapter 11 bankruptcy proceeding. Id.

Here, the defendants have not demonstrated that, should leave be denied, they will suffer irreparable injury; nor have they shown that their potential injury, if the appeal is not allowed, outweighs the potential injury to the plaintiff if the appeal is allowed. As Judge Wilson pointed out in his order:

> Defendants do not show that they have no claim for contribution against Oberbeck for any recovery from them by the Trustee, no defense in mitigation of any action against them on the note by Oberbeck, or no opportunity to present any such claims or defenses outside this adversary proceeding."

Furthermore, defendants have not demonstrated a substantial likelihood that they would prevail on appeal. Thus, defendants have failed to meet the necessary standard for this court to allow their appeal. Additionally, the court finds that the

interests of justice would better be served by a review of the bankruptcy court proceedings in their entirety at their conclusion. For these reasons, the Motion for Leave to Appeal is hereby denied.

It is so Ordered this 8th day of ~~August~~ Sept., 1987.

H. DALE COOK, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation,

Plaintiff,

vs.

UNITED FRUIT & PRODUCE COMPANY OF OKLAHOMA, a Missouri corporation,

Defendant,

vs.

TOM LANGE COMPANY, INC., a Missouri corporation,

Third-Party Defendant.

No. 85-C-1091-E

STIPULATION OF DISMISSAL

COMES NOW Defendant, United Fruit & Produce Company of Oklahoma, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, dismisses its cause of action against Third-Party Defendant, Tom Lange Company, Inc., without prejudice.

By: _____

Vincent D. Vogler (M.B.E. #25030)
VINCENT D. VOGLER AND ASSOCIATES
11330 Olive Street Road, Suite 200
P.O. Box 27337
St. Louis, MO 63141-1737
(314) 567-7970

ATTORNEYS FOR DEFENDANT UNITED FRUIT & PRODUCE COMPANY OF OKLAHOMA

By: _____

Benjamin C. Faulkner (O.B.A. #2845)
ENGLISH, JONES & FAULKNER
1700 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-1564

ATTORNEYS FOR THIRD-PARTY DEFENDANT, TOM LANGE COMPANY, INC.

By: _____

Tom L. Armstrong (O.B.A. #329)
Joe M. Fears (O.B.A. #2850)
MARSH & ARMSTRONG
808 OKEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0141

ATTORNEYS FOR PLAINTIFF, MISSOURI PACIFIC RAILROAD COMPANY

ORDER

The Court, having reviewed the foregoing Stipulation of Dismissal and being fully advised in the premises, finds that Defendant's Third-Party Complaint against the Third-Party Defendant should be dismissed, without prejudice.

IT IS SO ORDERED.

S/ JAMES O. ELLISON
JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP -8 1987

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, v. MARY JANE WAGNON, individually and as Administratrix of the Estate of James Dean Lucas, Deceased; and LINDA C. LUCAS, individually and as Administratrix of the Estate of Curtis James Lucas, Deceased, Defendants.	)	No. 86-C-1140-B

JUDGMENT OF DEFAULT

NOW ON this, the 8th day of September, 1987, comes on to be heard the Application for Entry of Judgment of Plaintiff, State Farm Mutual Automobile Insurance Company. Plaintiff appears by and through its attorney of record, Walter D. Haskins, of the law firm of Best, Sharp, Thomas, Glass & Atkinson, Tulsa, Oklahoma. Defendants, having been properly served with process in this action, do not appear.

The Court, being well advised in the premises, finds that Plaintiff's Application should be be and hereby is GRANTED.

IT IS THEREFORE, THE ORDER, JUDGMENT, AND DECREE as follows:

1. The Court finds that the sole liability of the State Farm Mutual Automobile Insurance Company to Defendants with regard to any insurance proceeds which are the subject of this action is $6,666.60;

2. The Defendants, and each of them, are restrained and enjoined from prosecuting any action existing in any other forum and from instituting any action in any other forum against the State Farm Mutual Automobile Insurance Company for claims which may have been asserted in this action;

3. That Plaintiff, State Farm Mutual Automobile Insurance Company, be

discharged from any and all liability to Defendants with regard to the subject matter of this action;

4. That the Defendants, and each of them, are restrained and enjoined from instituting or prosecuting further any proceeding in any state or United States court on account of the accident or occurrence which is the subject of this action.

IT IS SO ORDERED.

Honorable Thomas R. Brett
United States District Court Judge

SCW/jch

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP R. CHEROKA,

Plaintiff,

vs.

DENNY'S RESTAURANTS, INC.,

Defendant.

No. 87-C-40-B

ORDER OF DISMISSAL

NOW on this 8th day of September, 1987, upon the written application of the Plaintiff, Phillip R. Cheroka, and the Defendant, Denny's Restaurants, Inc., for a Dismissal with Prejudice as to all claims and causes of action involved in the Complaint of Cheroka v. Denny's, and the Court having examined said Application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint, and have requested the Court to Dismiss said Complaint with prejudice, to any future action. The Court being fully advised in the premises finds said settlement is to the best interest of said Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that all claims and causes of action of the Plaintiff, Phillip R. Cheroka, against the Defendant, Denny's Restaurants, Inc., be and the same hereby are dismissed with prejudice to any future action.

S/ THOMAS R. BRETT
JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OKLAHOMA

APPROVALS:

CRAIG ARMSTRONG

Craig R. Armstrong

Attorney for the Plaintiff

STEPHEN C. WILKERSON

Stephen C. Wilkerson

Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP -8 1987

DANIEL VANN, Plaintiff,	)	
v.	)	No. 86-C-919-B
THE BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, et al., Defendants.	)	

J U D G M E N T

In keeping with the verdict of the jury entered herein on the 19th day of August, 1987, relative to Plaintiff Daniel Vann's claim of racial discrimination pursuant to 42 U.S.C. §1983, and pursuant to the Findings of Fact and Conclusions of Law entered herein this date relative to Plaintiff's racial discrimination claim in violation of Title VII, 42 U.S.C. §2000e, Judgment is hereby entered in favor of the Defendant, George Phillips, and against the Plaintiff, Daniel Vann, and the Plaintiff is to take nothing on said claim.

Further, pursuant to the Court's sustaining of the Defendant The Board of County Commissioners of Tulsa County's motion for directed verdict at the conclusion of the Plaintiff's evidence, Judgment is hereby granted in favor of said Defendant and against the Plaintiff relative to Plaintiff's racial discrimination claim pursuant to 42 U.S.C. §1983 and 42 U.S.C. §2000e; and Plaintiff is to take nothing thereon

from said Defendant. The costs are hereby assessed against the Plaintiff, Daniel Vann, and the parties are to pay their own respective attorney fees.

DATED this 8th day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY JAMES GAMBLE, Petitioner, vs. TED WALLMAN, et al., Respondents.	)	No. 86-C-695-E
LARRY JAMES GAMBLE, Petitioner, vs. TED WALLMAN, et al., Respondents.	)	No. 86-C-809-E

O R D E R

The Court has reviewed Magistrate Wagner's Order of September 15, 1986, as well as the entire file encompassed herein. The Court finds that Petitioner's applications for habeas corpus relief in the above-styled cases attack the same state court conviction. Therefore, in furtherance of judicial economy, it is hereby ordered that these related cases be and are hereby consolidated for all purposes under case number 86-C-695-E.

In his applications, Petitioner attacks an Osage County District Court conviction in Case No. CRF-83-105. It is unclear what the nature of the offense involved was as petitioner in Case No. 86-C-695 states that the offense was commercial gambling and in 86-C-809 he states that he was charged with unlawful possession of marijuana. The file does not reflect the status of

10

Petitioner's direct appeal, although the pleadings suggest that his conviction may be currently on appeal before the Oklahoma Court of Criminal Appeals. In any event, Petitioner has not sought relief under the Post-Conviction Procedure Act. 22 O.S. §§1080-1088. Therefore, this Court is precluded from reviewing Petitioner's application. Duckworth v. Serrano, 454 U.S. 1 (1981).

IT IS ORDERED that Petitioner's applications for writ of habeas corpus be and are hereby denied.

ORDERED this 8th day of September, 1987.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNIT RIG & EQUIPMENT CO., INC.,

Plaintiff,

v.

BURAN EQUIPMENT COMPANY,

Defendant.

No. 87-C-321-B

O R D E R

This matter comes before the Court on Plaintiff Unit Rig & Equipment Co., Inc.'s motion for summary judgment under Fed.R.Civ.P. 56(a). The parties dispute the meaning of a contract. The Court finds the contract is clear and unambiguous. Partial summary judgment is appropriate. Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984).

In January 1984, Defendant Buran Equipment Company entered into a distributor agreement with Dart Truck Company (now Unit Rig & Equipment Co.). Defendant purchased equipment from Plaintiff. Plaintiff contends $68,016.11 of equipment was purchased. Defendant admits at least $66,686.80 of equipment was purchased.

Plaintiff terminated the distributor agreement effective June 4, 1985. Plaintiff is now suing for payment on the equipment. Defendant delivered back to the Plaintiff the inventory it had not yet sold allegedly valued at $38,698.63. Defendant delivered a check to Plaintiff for the balance that Defendant maintained was still due.

Defendant contends under the distributor agreement Plaintiff is obligated to repurchase the equipment. Plaintiff refused to accept the inventory and returned the check.

Paragraph 7(b) of the distributor agreement provides:

> "Dart may terminate this Agreement earlier without cause by providing written notice of termination to Distributor, which shall be effective ninety (90) days after receipt by Distributor. In the event Dart terminates this Agreement without cause or this Agreement terminates by its terms pursuant to Paragraph 2 above, Dart shall have a right of first refusal to purchase Distributor's inventory of new, unused and resaleable Products and shall purchase such Products at the request of Distributor by payment of the amounts determined as follows, less amounts then owing to Dart: ...."

The parties dispute the interpretation of this paragraph. Defendant contends the paragraph obligates Plaintiff to repurchase the inventory. The Court finds as a matter of law it does not. The paragraph read in its entirety, gives Plaintiff the right of first refusal and states the terms in the event Plaintiff elects to exercise that right. It is elementary that a right of first refusal does not require a seller to sell or a buyer to buy. It merely gives the holder of the right the preferential right to purchase when the seller chooses to sell. Landowners v. Pendry, 151 Kan. 674, 100 P.2d 632 (1940); Valley Lane Corp. v. Bowen, 592 P.2d 589 (Utah 1979); Ackerman v. City of Walsenburg, 171 Colo. 365, 467 P.2d 265 (1970); Ollie v. Rainbolt, 669 P.2d 275 (Okla. 1983). Plaintiff is not required to purchase this equipment.

The motion for partial summary judgment is therefore sustained in favor of Plaintiff for $66,686.80. The Court finds

the issues remaining for determination are (1) whether Defendant is indebted to Plaintiff for an additional $1,329.31, as Plaintiff originally contended; (2) the amount of prejudgment interest due; and (3) a reasonable attorney fee.

The parties are hereby ordered to adhere to the following schedule:

1. The parties are to exchange all witnesses' names and addresses, including experts, in writing and any witness that appears on the list whose deposition has not been taken, state briefly the subject of that witness' testimony by October 9, 1987.

2. The parties are granted until October 23, 1987, in which to complete discovery.

3. The parties are to exchange all prenumbered exhibits and file an agreed pretrial order by November 9, 1987.

4. The parties are to file Suggested Findings of Fact and Conclusions of Law and any trial briefs by November 16, 1987.

5. The case is set for nonjury trial on November 23, 1987, at 9:00 A.M.

IT IS SO ORDERED, this 8th day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FLYNN ENERGY CORP., Plaintiff,	)	
v.	)	No. 86-C-163-B
TULSA COMMERCE BANCSHARES, INC., BANK OF COMMERCE AND TRUST COMPANY, LEE I. LEVINSON, L. DALE MITCHELL, SIG KOHNEN, M-CORP, and M-BANK DALLAS NATIONAL ASSOCIATION, Defendants.	)	

ORDER

This matter comes before the Court on all Defendants'[1] Motions to Dismiss. Defendants offer the same grounds in support of their motions, thus, the motions are addressed together below. For the reasons set forth herein, the Defendants' Motion to Dismiss Count V of Plaintiff's Amended Complaint is sustained. The Court has been advised that Count IX of the Amended Complaint is now moot since the Federal Deposit Insurance Corporation has entered the case. The Defendants' Motions to Dismiss are overruled with respect to Counts I, II, III, IV, VI, VII and VIII of the Amended Complaint.

---

1 At Status Conference held March 18, 1987, Plaintiff advised the Court that Defendant Dale E. Mitchell has filed bankruptcy in the United States Bankruptcy Court for the Western District of Oklahoma. Plaintiff was to file a document to that effect within one week, but has not done so.

Plaintiff now alleges eight causes of action herein: I, II and III - federal securities law violations; IV - Oklahoma Securities Law violation; V - RICO; VI - common law fraud; VII - breach of contract; VIII - conversion. The Court's jurisdiction is based upon the alleged Federal Securities laws and/or the alleged RICO claim, as diversity of citizenship is lacking. Counts IV, VI, VII and VIII are pendent claims.

ALLEGATIONS OF FRAUD

Plaintiff alleges fraud against all Defendants as either direct perpetrators of fraud, control persons, or aiders and abettors. Plaintiff alleges the following facts in its Amended Complaint:

Plaintiff invested $5,022,000 with Bank of Commerce and Trust Co. ("Commerce Bank") in commercial paper of Tulsa Commerce Bancshares. The funds in Plaintiff's demand deposits would be withdrawn daily and placed in investments maturing on the next banking day. At the end of the next day the investment plus interest would be redeposited in the demand deposit account.

Plaintiff was lead to believe its deposited funds would be invested in Bancshares commercial paper which was invested in commercial paper obligations in the form of short term notes of M-Corp of Dallas.

On February 18, 1986, Plaintiff's commercial paper became due and three unsecured promissory notes matured. Commerce Bank has failed to pay or credit Plaintiff's account.

Prior to Plaintiff's investment, Commerce Bank and Bancshares, because of the bank's undercapitalized condition, promised the Federal Reserve it would cease issuing commercial paper or its commercial paper would have backup lines of credit of 100%. Commerce Bank promised to comply with all federal and state laws concerning commercial paper.

Plaintiff's investment, however, was not covered by backup lines of credit. Plaintiff's funds were also not ultimately invested in M-Corp's commercial paper as was promised Plaintiff. Defendants were obtaining money from investors such as Plaintiff, to postpone the failure of Commerce Bank by inflating the value of Commerce Bank stock. This was done by using the proceeds from the sale of Bancshare notes to purchase substandard and classified loans of Commerce Bank.

Plaintiff further alleges the following relationships:

Defendant Tulsa Commerce Bancshares, Inc. substantially owns and therefore controls Commerce Bank.

Defendant M-Bank, which is owned by Defendant M-Corp, loaned Commerce Bank $12,987,000, secured by Commerce Bank stock. Commerce Bank became in default of this loan. M-Bank immediately began consulting Commerce Bank on all Commerce Bank's significant management decisions. Therefore, M-Bank and M-Corp controlled or aided and abetted Commerce Bank in a fraud against Plaintiff.

Further, Defendants M-Bank and M-Corp caused Defendant Lee I. Levinson to become Chief Executive Officer and Chairman of the Board of Directors for Commerce Bank and Bancshares. Defendant Levinson is also a control person.

Defendants Dale E. Mitchell and Sig Kohnen failed to advise or deliberately concealed the fact (1) the financial condition of Bancshares was extremely weak, (2) Commerce was in default for $12,987,000 to M-Bank and was being directed by M-Bank and M-Corp, (3) Plaintiff's funds for commercial paper were not being invested in commercial paper of M-Corp as promised, (4) the proceeds from Plaintiff's investment were being used to carry low quality loans,[2] and (5) Bancshares was violating the agreement with the Federal Reserve in that none of Plaintiff's investment was being provided a backup line of credit.

All Defendants are sued for fraud under §12(2) of the Securities Act, §10-b of the Exchange Act and Rule 10-b(5). However, in the alternative, M-Corp and M-Bank are sued as aider and abettors under §12(2).

All Defendants are sued under §12(1). M-Bank, M-Corp, Levinson, Mitchell and Kohnen are charged with control person liability of the acts of Commerce Bank and Bancshares under §15 of the Securities Act and §20 of the Exchange Act. Levinson, Mitchell and Kohnen are also charged with direct fraudulent acts.

---

2 The Court orders all Plaintiffs alleging RICO claims to file a RICO Case Statement stating with specificity the details of their RICO claim. The RICO Case Statement is not evidence and is not submitted under oath. In the RICO Case Statement Plaintiff alleges "Defendants' scheme was to obtain money of the Plaintiff and others to postpone the failure of Bancshares and Commerce Bank and inflate the value of Commerce Bank stock. This plan consisted of using the proceeds from the sale of Bancshares notes to purchase substandard and classified loans of Commerce Bank. This was done in order to increase the value of the Bancshares stock...."

All Defendants are sued for Oklahoma state security fraud violations. Bancshares and Commerce Bank are sued for common law fraud and all others are sued for aiding and abetting that fraud.

PLEADING WITH PARTICULARITY

Defendants contend the Amended Complaint should be dismissed for failure to allege fraud in conformity with Fed.R.Civ.P. 9(b) which states:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

It is undisputed that the Complaint is not as precise as this rule requires it to be. However, Plaintiff points out all Defendants are insiders and Plaintiff cannot be expected at this point in the action to allege or know who played which part in the alleged fraud. The Court adopts the reasoning in Schlick v. Penn-Dixie Cement Corporation, 507 F.2d 374 (2nd Cir. 1974), and Banowitz v. State Exchange Bank, 600 F.Supp. 1466 (N.D.Ill. 1985). Defendants have been given sufficient notice of the alleged fraud to allow adequate responsive pleading.[3] Plaintiff urges that the facts of the alleged fraud are within the exclusive possession of the corporate insiders. Plaintiff cannot be expected to provide details as to the alleged fraud when Plaintiff has virtually no information about the corporate defendants' internal affairs. The allegations plead are sufficient notice to Defendants.

---

[3] The Court is particularly concerned with the conclusory allegations relative to the "insider" status of Defendants M-Corp and M-Bank. The Court will re-examine the issue thoroughly at the motion for summary judgment stage of this lawsuit.

All Defendants are sued for Oklahoma state security fraud violations. Bancshares and Commerce Bank are sued for common law fraud and all others are sued for aiding and abetting that fraud.

PLEADING WITH PARTICULARITY

Defendants contend the Amended Complaint should be dismissed for failure to allege fraud in conformity with Fed.R.Civ.P. 9(b) which states:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

It is undisputed that the Complaint is not as precise as this rule requires it to be. However, Plaintiff points out all Defendants are insiders and Plaintiff cannot be expected at this point in the action to allege or know who played which part in the alleged fraud. The Court adopts the reasoning in Schlick v. Penn-Dixie Cement Corporation, 507 F.2d 374 (2nd Cir. 1974), and Banowitz v. State Exchange Bank, 600 F.Supp. 1466 (N.D.Ill. 1985). Defendants have been given sufficient notice of the alleged fraud to allow adequate responsive pleading.[3] Plaintiff urges that the facts of the alleged fraud are within the exclusive possession of the corporate insiders. Plaintiff cannot be expected to provide details as to the alleged fraud when Plaintiff has virtually no information about the corporate defendants' internal affairs. The allegations plead are sufficient notice to Defendants.

[3] The Court is particularly concerned with the conclusory allegations relative to the "insider" status of Defendants M-Corp and M-Bank. The Court will re-examine the issue thoroughly at the motion for summary judgment stage of this lawsuit.

PLAINTIFF'S RICO CLAIM

Defendants have put forth various grounds for dismissing Plaintiff's claim under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961, et seq. These include failure to plead fraud with particularlity as required by Fed.R.Civ.P. 9(b), failure to plead sufficient facts establishing a pattern of racketeering activity and failure to establish an enterprise separate and distinct from the pattern of racketeering activity as required to state a claim under 18 U.S.C. §1962(c). Section 1962(c) provides:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

For purposes of §1962(c), a "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property. 18 U.S.C. §1961(3). An "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). A "pattern of racketeering activity" requires "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. §1961(5). Plaintiff alleges that the

persons liable under §1962(c) herein are Defendants Bancshares, Commerce Bank, Levinson, Mitchell, Kohnen, M-Corp and M-Bank. As outlined in Plaintiff's RICO Case Statement, the "enterprise" herein consisted of:

> "The Defendants were associated with one another in an enterprise entirely independent of the alleged racketeering activities. This enterprise existed to carry on legitimate banking business. This enterprise was begun and was designed to continue operating without performance of any unlawful acts. Specifically, Levinson, Mitchell and Kohnen were associated with one another and with Commerce Bank and Bancshares as directors or officers of Commerce Bank and Bancshares; Bancshares owned substantially all of the shares of Commerce Bank, thus associating the two; M-Bank is wholly owned by M-Corp., thus associating the two; M-Corp had loaned in excess of $12,000,000.00 to Bancshares and thereafter assigned such loan to M-Bank. Through the loan documents executed in connection with such loan, M-Bank had the ability to exercise and actually did exercise control over the day-to-day business affairs of Commerce Bank and Bancshares, thus associating M-Bank and M-Corp with Commerce Bank, Bancshares, Mitchell, Levinson and Kohnen. M-Bank loaned Mitchell the money to purchase his shares of Bancshares and through the leverage of its loans to Bancshares and the individual defendants, M-Bank induced Bancshares to issue shares of capital stock of Bancshares to Levinson and cause him to be elected as a senior managing officer of Commerce Bank."

Thus, the enterprise alleged is the "association between M-Corp, M-Bank, Bancshares and Commerce Bank and the respective named officers or directors, Levinson, Mitchell and Kohnen." Plaintiff's RICO Case Statement, ¶6(b), p. 15. Plaintiff contends that the Defendants Levinson, Mitchell, Kohnen,

Bancshares, Commerce Bank, M-Corp and M-Bank, are perpetrators of fraud as well as members of the enterprise. RICO Statement ¶6(e) pp. 15-16.

A violation of §1962(c), as alleged herein, requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Sedima, S.P.R.I. v. Imrex Co., 473 U.S. 479, 496 (1985). A plaintiff must allege each of these elements to state a claim. Id. An enterprise, as defined in §1961(4), may be either a legal entity or an "association in fact." The alleged enterprise must be an entity separate and apart from the pattern of activity in which it engages. United States v. Turkette, 452 U.S. 576, 583 (1981). This aspect of the enterprise requires proof of an organization beyond that necessary just to commit the racketeering acts themselves. United States v. Bledsoe, 674 F.2d 647, 664 (8th Cir.) cert. denied, 459 U.S. 1040 (1982). The "enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." Id.

Where the enterprise alleged is a legal entity, it should not be difficult to prove its existence separate from the racketeering activity. Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982). However, where, as here, the alleged enterprise is an "association in fact," it is more difficult to establish the requisite separateness. Id. Existence of such an enterprise is proved by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as

a continuing unit." United States v. Griffin, 660 F.2d 996, 999 (4th Cir.), cert. denied, 454 U.S. 1156 (1982) (citing, Turkette, supra). In Bledsoe, supra, the Eighth Circuit Court of Appeals outlined a three-part test for an "association in fact." There must be: (1) proof of a common purpose among the associated parties; (2) proof of some continuity of structure and personality, and (3) proof of an ascertainable structure beyond that inherent in the conduct of a pattern of racketeering. Id. at 664-65. After reviewing Plaintiff's Amended Complaint and RICO Case Statement as well as the briefs filed herein and arguments of counsel propounded at the hearing on pending motions held June 4, 1987, the Court concludes that the enterprise alleged by the Plaintiff fails to meet the third prong of the Bledsoe test. Plaintiff has alleged an ongoing business relationship between the Defendants herein and has alleged that this relationship was corrupted by a pattern of racketeering. However, these conclusory statements are insufficient to establish the enterprise requirement of §1962(c). Plaintiff has offered nothing which might establish, for example, that the Defendants herein "engaged in a diverse pattern" of unlawful activity or had "an organizational pattern or system of authority" beyond that necessary to perpetrate the predicate acts. Bledsoe at 665. Viewing the allegations contained in the Amended Complaint and the RICO Case Statement in the light most favorable to the Plaintiff, the Court concludes that the enterprise alleged has no "ascertainable structure" distinct from that necessary for the conduct of the alleged racketeering activity. While the Defendants knew each other and various combinations of the Defendants were associated with each other in conducting common

business, the Court concludes there simply is no organization among the Defendants which existed on an ongoing basis beyond the alleged racketeering conduct. Thus, Plaintiff has failed to allege a viable enterprise for purposes of 18 U.S.C. §1962(c). Therefore, Plaintiff has failed to state a claim for violation of RICO and it is unnecessary to address Defendants' other arguments in support of their Motions to Dismiss the RICO claim.

PLAINTIFF'S FEDERAL SECURITIES CLAIMS

The first issue before the Court is whether the commercial paper which is the focus of this lawsuit is a "security" for purposes of the Securities Act of 1933, 15 U.S.C. §77(a) et seq., and the Securities Exchange Act of 1934, 15 U.S.C. §78(a) et seq.[4]/

4

Exhibit A to Plaintiff's Complaint, the Written Agreement between the Federal Reserve Bank of Kansas City, Missouri, and Tulsa Commerce Bancshares, Inc. indicates that the parties assumed the commercial paper at issue was a security. Paragraph 3(b)(ii) states:

> "In the event that Tulsa Commerce decides to continue the issuance and sale of commercial paper in accordance with the provisions of paragraph 3(a) hereof, Tulsa Commerce shall . . . conform by June 30, 1985, all issues of commercial paper to the provisions of 15 U.S.C. 77c(a)(3) or otherwise comply with the registration requirements and any other applicable provisions of the Securities Act of 1933. . . ."

Paragraph 3(b)(iii) provides that Tulsa Commerce will also:

> "obtain, by March 31, 1985, a written advisory opinion of an independent outside counsel relative to the use of the proceeds from commercial paper issued by the holding company as such proceeds relate to the current transactions guidelines of applicable securities laws."

While these provisions are not determinative of the securities question before this Court, they do indicate that the parties believed that federal securities laws could be applicable, to some degree, in this instance.

Plaintiff's Amended Complaint alleges that the commercial paper sold by Bancshares was issued in violation of the registration and antifraud provisions of the Securities Act of 1933 ("1933 Act"), and an antifraud provision of the Securities Exchange Act of 1934 ("1934 Act") (collectively the "Securities Acts"). Although each of these acts defines "notes" as securities, they treat the category of notes known as "commercial paper" differently for purposes of burden of pleading and proving that the commercial paper at issue is a security under that Act. The 1933 Act defines a security as "any note, stock, treasury stock, bond, debenture, evidence of indebtedness . . ." 15 U.S.C. §77(a)(3) exempts from registration "Any note . . . which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." To state a claim under the 1933 Act, Plaintiff must allege that the notes at issue are "securities" within the terms of that Act. Fed.R.Civ.P. 12(b)(6) must be read in conjunction with Rule 8(a) which requires a short plain statement of a claim. The Complaint must be viewed in the light most favorable to the plaintiff and its allegations taken as true. Scheuer v. Rhodes, 416 U.S. 232 (1974); Olphin v. Ideal Nat. Ins. Co., 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074 (1970). A motion to dismiss for failure to state a claim should not be sustained unless it appears beyond doubt that

the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974). The burden of proving the notes in question are securities is "a light one." Floyd v. First Penn Corporation, [1982-83 Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶99,132 at 95,477 (W.D.Okl. 1983). The Complaint describes the notes herein as "commercial paper consisting of one, two or three day unsecured promissory notes" and "three unsecured promissory notes." These allegations, taken as true and construed in the light most favorable to the plaintiff satisfy the burden of pleading a security for purposes of the 1933 Act. The Court may re-address this issue on an appropriate motion for summary judgment. However, the Court concludes that Plaintiff has stated a claim under the 1933 Act. Accordingly, the motion to dismiss is overruled.

The 1934 Act provides, in pertinent part:

> ""The term 'security' . . . shall not include currency, or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the material of which is likewise limited." 15 U.S.C. §78c(a)(10)

Thus, while the 1933 Act exempts certain securities from the registration requirements of that act, the 1934 Act excludes certain instruments from the definition of security. Although the maturity dates of the notes at issue would seem to place them within the statutory exclusion of 78c(a)(10), numerous courts have held that this exclusion is limited to:

> ". . . only . . . prime quality negotiable [commercial] paper of a type not ordinarily purchased by the general public, that is, paper used to facilitate well recognized types of current operational business requirements and of a type eligible for discounting by Federal Reserve banks."

Zabriskie v. Lewis, 507 F.2d 546, 550 (10th Cir. 1974). The Court concludes that the notes at issue herein were not prime quality negotiable commercial paper, and, thus, did not fall within the statutory exclusion of §78c(a)(10).

Defendant Levinson contends that Plaintiff has failed to allege facts showing the elements of a security as required by the United States Supreme Court in SEC v. W. J. Howey & Co., 328 U.S. 293 (1946). However, this four-part test only determines whether an instrument is an "investment contract." An instrument may still be a security if it falls under one of the other specific statutory terms. Hunssinger v. Rockford Business Credits, Inc., 745 F.2d 484, 491 (10th Cir. 1984). Thus, this contention is without merit.

Levinson next contends that the Bancshares commercial paper falls within a judicially-created commercial purpose exception to the definition of notes as securities. See, McClure v. First Nat'l Bank, 497 F.2d 490 (5th Cir. 1974); Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973); Zeller v. Bogue Elec. Mfg. Co., 476 F.2d 795 (2d Cir. 1973), cert. denied, 414 U.S. 908 (1973). Notes generated in consumer transactions are commercial in character and have been held to be outside the parameters of the Securities Acts. Zabriskie v. Lewis, 507 F.2d 546 (10th Cir.

1974). However, when a person seeks to invest his money and receives a note for it, he has not purchased commercial paper, he has purchased a security investment. Sanders v. John Nuveen & Co., Inc., 463 F.2d 1075 (7th Cir.), cert. denied, 409 U.S. 1009 (1972). Clearly, the commercial paper purchased herein was purchased for investment, not commercial, purposes. Thus, the Court finds this contention also without merit.

Finally, Levinson analogizes the commercial paper herein to certificates of deposits. The Court finds no justification for this attempted analogy. Levinson relies on Marine Bank v. Weaver, 455 U.S. 551 (1982) for this contention. The certificate of deposit at issue in Marine Bank was a long-term, FDIC-insured, bank obligation. The commercial paper at issue herein consists of short-term notes which are not FDIC-insured and not bank obligations. Thus, Levinson's reliance on Marine Bank is misplaced. The purchaser of a certificate of deposit has "virtually guaranteed payment in full." Marine Bank, supra, at 557-58. However, the holder of a more typical long-term debt obligation assumes the risk of the borrower's insolvency. Id. The differences between a certificate of deposit and other long-term debt obligations are substantial and undercut Levinson's claim that a CD is legally indistiguishable from commercial paper having a term of two business days. Thus, the Court also finds this contention without merit. For these reasons, the Court concludes that the commercial paper at issue falls within the definition of a security for purposes of the 1933 and 1934 Acts

and is not excluded from coverage under the Securities Acts. Defendants' motions to dismiss for failure to state a claim are, therefore, denied. Because the Court concludes that the commercial paper herein is a security, the motions to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) are also denied.

CONVERSION CLAIM

Defendants request this Court to dismiss Plaintiff's claim for conversion. Defendant basically contends that under Oklahoma law (1) funds cannot be converted because they are not specifically identifiable, and (2) the property must be illegally taken, which is not the situation here.

An early Oklahoma case which has not been overturned does state "an action for the conversion of money cannot be maintained unless the money can be described or identified as a specific chattel." Wright v. School Dist. No. 97, 128 P. 241 (Okla. 1912). Some jurisdictions still so hold. Great Commonwealth Life Insurance Co. v. Banco Obrero de Ahorro Y Prestamos, 535 F.2d 331 (5th Cir. 1976); Temmen v. Kent-Brown, 605 P.2d 95 (Kan. 1980); Lyxell v. Vautrin, 604 F.2d 18 (5th Cir. 1979); Ahern v. Gaussoin, 611 F.Supp. 1465 (D.C.Oregon 1985). However, it appears Oklahoma no longer adheres to this rule. Today conversion concerns personal property including funds. May v. City National Bank and Trust Co., 258 P.2d 944 (Okla. 1953); Master Commodities, Inc. v. Texas Cattle Management, 586 F.2d 1352 (10th Cir. 1978); ITT Industrial Credit Co. v. L-P Gas Equipment, Inc., 453 F.Supp. 671 (W.D.Okla. 1978).

As to Defendants' second argument, under Oklahoma law, even though the initial taking is legal and consented to, conversion will still lie if the detention of the property is not consented to or the property has been misappropriated. General Motors Acceptance Corp. v. Vincent, 83 P.2d 539 (Okla. 1938); Wolfe v. Faulkner, 628 P.2d 700 (Okla. 1981); Londa Manufacturing v. Saturn, 503 F.Supp. 52 (W.D.Okla. 1980). Plaintiff herein alleges its funds were ultimately used for the purchase of Commerce Bank's low quality short term loans instead of M-Corp commercial paper as Plaintiff had been promised. Defendants' motion for dismissal of the conversion claim is denied, but may be re-examined at the Rule 56 stage.

Defendants' Motions to Dismiss Plaintiff's RICO claim are hereby sustained. With respect to all other counts, Defendants' motions are denied.

The parties herein shall adhere to the following schedule:

A. Defendants shall file an answer within 15 days from this date;

B. The parties shall amend pleadings or join additional parties by September 30, 1987;

C. The parties are to exchange the names and addresses of all witnesses, including experts, in writing, along with a brief statement re each witness' expected testimony (not necessary if witness' deposition taken) by December 21, 1987;

D. The parties are granted until January 4, 1988, in which to complete discvery;

E. Dispositive motions shall be filed by January 11, 1988; responses shall be filed by January 21, 1988, and replies, if any, should be filed by February 2, 1988;

F. The case is set for final pretrial hearing and hearing on any dispositive motions at 2:15 P.M., on February 11, 1988.

IT IS SO ORDERED this 2nd day of September 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

SEP 4 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHYSICIANS DIGITAL RESOURCES, INC.,

Plaintiff,

vs.

ROBERT BODILY, STEVEN NALL and INTEGRATED HEALTH SYSTEMS, INC.,

Defendants.

CASE NO. 86-C-132-E

JUDGMENT OF PERMANENT INJUNCTION

THIS CAUSE comes on to be heard on this 3rd day of Sept, 1987, by Joint Agreement of the Parties. The Court, having considered the Pleading filed herein, FINDS that this is an Agreed Judgment as evidenced by the signatures of each Party's Counsel. The Court, therefore, FINDS, ORDERS, ADJUDGES and DECREES:

1. That this is an agreed upon Judgment.

2. That the **DEFENDANTS ROBERT BODILY, STEVEN NALL** and **INTEGRATED HEALTH SYSTEMS, INC.**, and the officers, directors, agents, servants and employees of the **DEFENDANTS** are hereby permanently enjoined from:

(a) Directly or indirectly destroying any documents, computer programs, printouts or computer diskettes, and from altering, modifying or making disclosures to third parties concerning the Physician Information Network (PIN) Programs Version 2.4(b) and 3.0; and

(b) From using or disclosing to any third party or from soliciting, selling or attempting to sell customer lists, conversion programs, programs or source code for the PIN Version 2.4(b) or 3.0 in their possession or under their control, except that the **DEFENDANT STEVEN NALL,** may continue to use for the purpose of his own chiropractic clinic only, the assembled PIN Version 3.0 currently in his possession.

3. The Bond previously posted by the **PLAINTIFF, PHYSICIANS DIGITAL RESOURCES, INC.,** in the sum of Five Hundred and No/100 Dollars ($500.00), shall be returned to the **PLAINTIFF,** and no further Bond shall be required.

JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

STEPHEN R. CLARK
Attorney for **PLAINTIFF**

LUANNA HAMILL
Attorney for **ROBERT BODILY**

JAMES E. GREEN
Attorney for **STEVEN NALL** and
INTEGRATED HEALTH SYSTEMS, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEARCH INNOVATIONS ASSOCIATES, an Oklahoma partnership,

Plaintiff,

vs.

HOLQUIN CORPORATION, a Texas corporation,

Defendant.

Case No. 87-C-388-E

FILED
SEP 4 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

Plaintiff and defendant, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), stipulate that all claims raised by the parties in the above-styled action shall be, and hereby are, dismissed with prejudice.

Respectfully submitted,

BARROW, GADDIS, GRIFFITH & GRIMM

By _____
William R. Grimm
Maribob L. Lee
610 S. Main, Suite 300
Tulsa, Oklahoma 74119

ATTORNEYS FOR PLAINTIFF

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON

By _____
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4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEY FOR DEFENDANT

2058G/FMB

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARMSTRONG WORLD INDUSTRIES, INC., a Pennsylvania Corporation,

Plaintiff,

vs.

CLINTON MILLS, INC., a South Carolina Corporation; MID-AMERICA YARN MILLS, INC., an Oklahoma Corporation; SUNTEK INDUSTRIES, INC., an Oklahoma Corporation; and VENTURE ASSOCIATES, a Tennessee Partnership,

Defendants.

No. 87-C-562 B

NOTICE OF DISMISSAL OF DEFENDANTS, CLINTON MILLS, INC. AND MID-AMERICA YARN MILLS

Notice is hereby given that Armstrong World Industries, Inc., the above-named plaintiff, hereby dismisses with prejudice the above entitled action as to defendants, Clinton Mills, Inc. and Mid-America Yarn Mills, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, and hereby files this Notice of Dismissal with the Clerk of the Court before service by either defendant of either an answer or a motion for summary judgment.

Dated this 4th day of September, 1987.

Terry M. Thomas
NORMAN, WOHLGEMUTH & THOMPSON
909 Kennedy Bldg.
Tulsa, OK 74103
(918) 583-7571

Attorneys for Plaintiff,
Armstrong World Industries, Inc.

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of September, 1987, I mailed a true and correct copy of the above and foregoing instrument to:

Edward W. Kallal, Jr., Esq.
Sutherland, Asbill & Brennan
3100 First Atlanta Tower
Atlanta, Georgia 30383

Timothy E. McCormick, Esq.
1516 South Boston
Suite 205
Tulsa, Oklahoma 74119

C. William Denton, Esq.
Borod & Huggins
80 Monroe Avenue, 7th Floor
Memphis, Tennessee 38103

by depositing said copy in the United States mail, postage prepaid thereon.

Terry M. Thomas

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN [illegible] INSURANCE EXCHANGE	)	
Plaintiff,	)	
vs.	)	Case No. 86-C-148-B
JOHN G. CLARY, et al.,	)	
Defendants.	)	

ORDER OF DISMISSAL

NOW on this 3rd day of September, 1987, the above styled and numbered cause coming on for hearing before the undersigned Judge of the United States District Court in and for the Northern District of Oklahoma, upon the Stipulation for Order of Dismissal of the Plaintiff, Defendants, C.B.S. Insurance Agency, Inc., Fred Roseborough, individually and d/b/a Fred Roseborough Agency, and H. R. Eveland, and Intervenor, State Farm Insurance Company, herein; and the Court, having examined the pleadings and being well and fully advised in the premises, is of the opinion that said cause should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be, and the same is hereby dismissed with prejudice.

S/ THOMAS R. BRETT

JUDGE OF THE U. S. DISTRICT COURT

APPROVED AS TO FORM:

HOUSTON & KLEIN
320 South Boston, Suite 700
Tulsa, Oklahoma 74103
(918) 583 2131

By: _____
TODD MAXWELL HENSHAW, OBA # 4114
Attorney for Plaintiff

WILLIAM J. BERGNER
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Oklahoma City, Oklahoma 73146
(405) 232-2020

By: _____
WILLIAM J. BERGNER, OBA # 728
Attorney for Defendants,
C.B.S. Insurance Agency, Inc.,
Fred Roseborough, Individually
and d/b/a Fred Roseborough
Agency, and H. E. Eveland

WILLIAMS, CLARK, BAEPP & PAPI
1605 South Denver
Tulsa, Oklahoma 74119
(918) 583-1124

By: _____
JOSEPH F. CLARK, JR., OBA # 1706
Attorney for Intervenor,
State Farm Insurance Company

Entered

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAROLD L. PICKENS and BARBARA PICKENS, husband and wife,

Plaintiffs,

v.

No. 86-C-810-BT

CAPITAL MORTGAGE COMPANY; FLEET MORTGAGE COMPANY; AGS TITLE COMPANY; STANLEY R. SPICER and DORIS L. SPICER, husband and wife; CURTIS BROOKS,

Defendants.

O R D E R

On July 28, 1987, the Court sustained Defendants AGS Title Company and Fleet Mortgage Company's motions for summary judgment and a status conference was set for August 11, 1987. At the status conference set on that date, Plaintiffs' attorney did not appear and had to be called on the telephone. At that time, Plaintiffs' counsel advised the Court he would file a memorandum outlining the remaining issues in the case by August 14, 1987, and Defendants' counsel was to respond by August 25, 1987. Plaintiffs' counsel failed to file such document.

At the time of the telephone status conference on August 11, 1987, another status conference was set for August 28, 1987, for the purpose of allowing Plaintiffs' counsel to suggest what the future course of action would be concerning this case. All counsel were sent notice of the status conference.

Again, Plaintiffs' counsel failed to appear on August 28, 1987. Counsel for Defendants AGS Title Company and Fleet Management Company appeared but the other Defendants made no appearance. After being called on the telephone, Plaintiffs' counsel's office informed the Court he was in California on another matter.

The Court hereby dismisses this action as to the remaining Defendants Capital Mortgage Company, Stanley K. Spicer, Doris L. Spicer, and Curtis Brooks without prejudice for failure of Plaintiffs to prosecute under Fed.R.Civ.P.41. The claim against Defendants Fleet Mortgage Company and AGS Title Company has already been decided on the merits in the previous order filed July 27, 1987.

IT IS SO ORDERED this 2nd day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

QUARLES DRILLING CORPORATION,)
)
Plaintiff,)
)
v.) No. 87-C-245-B
)
SANTA FE ENERGY OPERATING)
PARTNERS, LP, a limited)
partnership,)
)
Defendant.)

FILED

SEP - 3 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

O R D E R

This matter comes before the Court on Defendant Santa Fe Energy Operating Partners, LP's ("Santa Fe") motion to reconsider filed July 10, 1987. The Defendant takes exception to the Court's ruling of July 1, 1987, which denied the motion to dismiss or in the alternative to transfer the instant case to the Southern District of Texas. Also before the Court is the Defendant's motion for oral argument filed July 24, 1987. In light of the Court hearing arguments of counsel at the August 12, 1987 status conference, the Court finds a hearing unnecessary to decide the instant motion. For the reasons set forth below, the Defendant's motion to reconsider is granted and the instant lawsuit is hereby transferred to the Southern District of Texas.

There being no dispute that both jurisdiction and venue is proper in the Northern District of Oklahoma, the central issue to be decided by the Court on this motion to reconsider is whether factors exist that makes the litigation more convenient and judicious in another forum.

Subsequent to the Court's consideration of the convenience factors in its original order, the Defendant has provided affidavits of its employees and attorneys which show that a considerable number of the Defendant's witnesses are located in Texas and would be inconvenienced by a Tulsa, Oklahoma trial.

As stated in the Court's initial order there are three factors to be considered under a 28 U.S.C. §1404(a) motion. The first factor to be considered under a §1404(a) motion is the convenience of the parties. Plaintiff's choice of forum should rarely be disturbed unless evidence and circumstances are strongly in favor of the transfer. National Sur. Corp. v. Robert M. Barton Corp., 44 F.Supp. 222 (D.C.Okla. 1979). While the Plaintiff's initial and preferred forum is the United States District Court for the Northern District of Oklahoma, the Plaintiff's assertion that the Southern District of Texas is inconvenient holds little weight as the Plaintiff has also commenced an identical suit in the Southern District of Texas. The Court considers this willingness to litigate in both forums an important consideration in determining the convenience of parties factor.

The second factor to be reviewed under §1404(a) is the convenience of witnesses. The Court's initial order concluded that the convenience of witnesses favored trying the case in the Northern District of Oklahoma and therefore denied the motion to transfer. Upon reconsideration, in light of the affidavits filed on behalf of the Defendant, it is apparent there are

numerous witnesses who reside in Texas who would be inconvenienced by a trial in Tulsa, Oklahoma. As evidenced by the affidavits and the statements of counsel at the status conference, there are three oil field service companies, Schlumberger, Precision Well Logging, Inc., and Milpark Drilling Fluid, that performed operations on the oil well that is the subject of this dispute that may be joined as parties or at least will have numerous employees who will be required to testify at the trial. See, Affidavit of J. D. Page, Affidavit of Ron Sheehan, Affidavit of Pat Parno and Affidavit of Carl Greer.

The Plaintiff Quarles counters that it prefers the Oklahoma forum and that its witnesses will be inconvenienced by travel to Houston. The Court finds that the Plaintiff's witnesses who will be called to testify as to the issues on the contract are few as compared with the witnesses who will testify to the occurrences and facts surrounding the actual drilling of the oil and gas well that is the subject of this action. Plaintiff also admits that its employee witnesses as to the drilling of the well are from West Texas and that such witnesses will find the Houston, Texas forum as convenient as Tulsa, Oklahoma. The Court's review of the evidence indicates that the contract negotiation aspect of the lawsuit will not be a significant portion of the ultimate disposition of this case and therefore finds the convenience of witnesses to that aspect of the case should be given limited consideration. It is apparent from the affidavits of the Defendant and the admission of the Plaintiff in its affidavit

that numerous party and nonparty witnesses who are anticipated to testify reside in Texas and face the inconvenience of travel to Tulsa. Therefore, the Court finds that the convenience of witnesses favors the resolution of this case in the Southern District of Texas.

The third factor to be considered under §1404(a) is the interest of justice. The Court finds that this case should be transferred to avoid duplicate trials on identical subject matters in light of the fact that an identical lawsuit is now proceeding in the Southern District of Texas. See, Wyndham Associates v. Bintliff, 398 F.2d 614 (2d Cir. 1968, cert. denied, 393 U.S. 977. In weighing the third factor of the motion to reconsider, the Court takes into consideration the possibility that the Defendant Santa Fe may find it necessary to implead one or more of the oil field service companies that performed work on the Bruni-Killam No. 1 well. See, Affidavit of J. D. Page. The Defendant's ability to join a third-party defendant in the Northern District of Oklahoma and obtain in personam jurisdiction is questionable as is this Court's ability to compel the attendance of any unwilling witnesses located in Texas. See, Koeneke v. Greyhound Lines, Inc., 289 F.Supp. 487 (W.D.Okla. 1968).

The Court finds that the additional evidence provided by the Defendant is sufficient to sustain its burden on a motion to transfer pursuant to 28 U.S.C. §1404(a). The Court therefore reconsiders its previous order and grants the Defendant's motion

to transfer this case to the Southern District of Texas. The Court hereby orders this case transferred to the United States District Court for the Southern District of Texas.

IT IS SO ORDERED, this 4th day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEARS, ROEBUCK AND CO., Plaintiff,	)	
v.	)	No. 85-C-685-B
COLEMAN-ERVIN-JOHNSTON, INC., Defendant,	)	
v.	)	
THE LAW COMPANY, INC., Third-Party Defendant.	)	

ORDER

This matter comes before the Court on Defendant Coleman-Ervin-Johnston, Inc.'s motion for judgment notwithstanding the verdict. Also before the Court is the application for order awarding attorney's fees in favor of the Plaintiff, Sears, Roebuck & Co., and the Third-Party Defendant The Law Company, Inc's motion to tax costs and recover attorney's fees. The Defendant Coleman-Ervin-Johnston has filed its objections to the Third-Party Defendant's bill of costs and motion to tax attorney's fees and an objection to the Plaintiff's bill of costs and motion to tax attorney's fees as costs.

The Court finds that the motions regarding the taxing of costs are moot in light of the bill of costs filed by the Clerk of the court on August 11, 1987. The Court, finding no objections to the Clerk's actions under Fed.R.Civ.P. 54(d), considers the cost requests final and moot.

The Plaintiff, Sears, Roebuck and Co. ("Sears") moves for an award of attorney's fees as the prevailing party in this action pursuant to 12 Okl.St.Ann. §939 (Supp. 1987). Plaintiff concedes that the contract between Sears and the Defendant Coleman-Ervin-Johnston, Inc. contains no provision with regard to attorney's fees and that any attorney's fee award must be based on an appropriate statute. Plaintiff selectively cites 12 Okl.St.Ann. §939 as follows:

> "In any civil action brought to recover damages for breach of an express warranty ... the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, which shall be taxed and collected as costs."

The remainder of the statute not quoted by the Plaintiff reveals that 12 Okl.St.Ann. §939 is an attorney's fee provision for actions brought on express warranties under the Uniform Commercial Code. It is clear that the instant dispute was brought for breach of an express warranty in a contract for services and is not within the scope of the Uniform Commercial Code. See, 12A Okl.St.Ann. §2-102. While Plaintiff recognizes that the provision for attorney's fees under 12 O.S. §939 might to be construed as limited only to actions under the UCC, it argues that there is no statutory language or case law that so limits this statute. Likewise, there is no authority that would authorize the Court to extend the award of attorney's fees in non-UCC matters on the basis of the clear and unambiguous language of 12 O.S. §939. Plaintiff's motion for award of attorney's fees is overruled.

The Third-Party Defendant, The Law Company, Inc., moves the Court for an award of attorney's fees pursuant to 12 O.S. §940. The Third-Party Defendant argues that §940 is applicable here because the basis of the Third-Party Plaintiff's cause of action was an alleged negligent injury to property.

As correctly pointed out by the Defendant, the Third-Party Complaint was not a claim for negligence but one for indemnification in the event that the Third-Party Plaintiff Coleman-Ervin-Johnston, Inc. was held liable to the Plaintiff Sears, Roebuck and Co. In the Court's order of January 27, 1987, overruling the Third-Party Defendant's motion to dismiss, the Court made clear that the third-party action was not one that sounded in tort. After reviewing the authority under Oklahoma law for actions based on implied indemnity, the Court stated:

> "The Court finds that the plaintiff has stated a cause of action for indemnity under Oklahoma law in its third party complaint and therefore the joinder of the third party defendant, The Law Company, Inc., is proper ..." (See Order of January 27, 1987, at page 4)

As the Court's order and the actual trial of the third-party complaint made clear, the third-party action was one for indemnity and not for negligent injury to property. Therefore, the Court finds that 12 O.S. §940 has no application and the Third-Party Defendant's motion for award of attorney's fees is denied.

The remaining point for consideration is the Defendant Coleman-Ervin-Johnston, Inc.'s motion for judgment notwithstanding the verdict. The Defendant in urging its motion

claims that the undisputed evidence establishes that all applicable statute of limitations had run before the filing of the instant action. The Court addressed the statute of limitations question in its order dated March 26, 1986, overruling the Defendant's motion for summary judgment on the limitations defense. The Court finds that the Defendant has raised nothing new which would merit a reversal of the Court's earlier ruling and therefore re-adopts the decision and reasons therefor set out in its March 26, 1986 order.

For the reasons stated above, the Plaintiff's motion to tax attorney's fees as costs is denied, the Third-Party Defendant's motion to tax costs and recover attorney's fees is denied, and the Defendant Coleman-Ervin-Johnston, Inc.'s motion for judgment notwithstanding the verdict is overruled.

IT IS SO ORDERED this 30th day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

PENN SQUARE, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 87-C-354-C
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to the agreement of all parties to this action, as evidenced by the undersigned attorneys of record,

IT IS ORDERED AND ADJUDGED that the Plaintiff Penn Square, Inc. recover of the Defendant Federal Deposit Insurance Corporation the sum of $12,819.92 plus interest at the rate of eighteen percent (18%) from August 1, 1985 until paid, plus costs in the amount of $123.60, plus attorneys fees in the amount of $1,000.00.

Dated at Tulsa, Oklahoma this 2 day of Sept, 1987.

United States District Judge

Attorney for Penn Square, Inc.

Attorney for Federal Deposit Insurance Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WESTERN FIRE INSURANCE CO.,	Plaintiff,	
v.		No. 85-C-59-E
RAYMOND DARRELL DAVIS, HOWARD SANDERS and TOWN OF SALINA,	Defendants,	
and		
AGENCY OF INSURANCE PROFESSIONALS, INC.,	Third Party Defendant.	

ORDER

Upon Stipulation of the parties filed herein, this case is dismissed without prejudice.

Dated this 2nd day of Sept, 1987.

S/ JAMES O. ELLISON
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WESTERN FIRE INSURANCE CO., Plaintiff,	)	
v.	)	No. 85-C-59-E
RAYMOND DARRELL DAVIS, HOWARD SANDERS and TOWN OF SALINA, Defendants,	)	
and	)	
AGENCY OF INSURANCE PROFESSIONALS, INC., Third Party Defendant.	)	

ORDER

Upon Stipulation of the parties filed herein, this case is dismissed without prejudice.

Dated this 11 day of Sept, 1987.

U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN MARK MCDONALD,

Plaintiff,

vs.

THE CITY OF TULSA, OKLAHOMA, et. al.,

No. 84-C-638-E

CONSENT DECREE

Plaintiff John Mark McDonald filed complaint herein on July 17, 1984, alleging violations of his civil rights and seeking compensatory damages, punitive damages and attorney fees. Plaintiff John Mark McDonald, by and through his attorneys of record, Thomas E. Salisbury and Larry Oliver, and the defendant City of Tulsa, by and through its attorney, David L. Pauling, have each consented to the making and entry of this consent decree, without trial and without adjudication of any issue of fact or law arising herein and the Court having considered the parties' joint application for approval of consent judgment and being duly advised, orders, adjudges and decrees as follows:

1. This court has jurisdiction over the subject matter of this action and the parties hereto. Plaintiff's complaint properly states claims for relief against the consenting defendant, City of Tulsa, Oklahoma, pursuant to 42 U.S.C. §1983.

2. The defendant City of Tulsa, Oklahoma, a municipal corporation, shall pay to the plaintiff the sum of $2,000.00, said sum representing full, final and complete payment upon all

sustained damages, all attorney fees incurred by plaintiff, and all court costs incurred by plaintiff as a result of this litigation.

3. This consent decree shall not constitute an admission of liability or fault on the part of the consenting defendant, City of Tulsa, Oklahoma.

4. This consent decree shall include and cover all issues of fact and law arising from the events identified in plaintiff's complaint, and it shall act as a final judgment with reference thereto and all issues arising therefrom with regard to all damages sustained by plaintiff.

Dated this 2nd day of ~~April~~ September, 1987.

James O. Ellison
United States District Judge

We, the undersigned, hereby consent to the entry of the foregoing consent decree as a final judgment herein.

Thomas E. Salisbury
Co-Counsel for Plaintiff

Larry Oliver
Co-Counsel for Plaintiff

David L. Pauling
Attorney for defendant
City of Tulsa, Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DATAQ, INC., Plaintiff,	)	
vs.	)	No. 78-C-484-E
TOKHEIM CORPORATION, Defendant.	)	

JUDGMENT

This action came on for trial before the Court and a jury, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and the jury having rendered its special verdict, finding in favor of Defendant Tokheim Corporation on the issues of prior use or sale, and inequitable conduct concerning Plaintiff's patent application, in favor of Plaintiff Dataq, Inc. on the affirmative defenses of obviousness, indefiniteness, and inadequacy of description, in favor of Defendant Tokheim Corporation on the issue of direct infringement, and against the Defendant Tokheim Corporation on the issue of infringement under the doctrine of equivalents,

IT IS THEREFORE ORDERED that the Plaintiff, Dataq, Inc., take nothing from the Defendant, Tokheim Corporation, that Patent No. 3,895,735 is hereby declared invalid, and that the Defendant Tokheim Corporation recover of the Plaintiff its costs of action.

DATED this 2nd day of September, 1987.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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C-25
5/85

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Utica National Bank & Trust Co.

Plaintiff(s),

vs.

James R. Fraser & David E.Worthen,Dr. Robert Marquardt,Sr.,& Helen K.Marquardt,Robert Lovell, Combined Energy Assoc.,partnership composed of Diane McCleery,Phillip A. Rennert, Jay L.Anderson, Gen.Partners

Defendant(s).

No. 85-C-512-E

FILED

SEP 2 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER
OF DISMISSAL

Rule 36(a) of the Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

> (a) In any case in which no action has been taken by the parties for six (6) months, it shall be the duty of the Clerk to mail notice thereof to counsel of record or to the parties, if their post office addresses are known. If such notice has been given and no action has been taken in the case within thirty (30) days of the date of the notice, an order of dismissal may in the Court's discretion be entered.

In the action herein, notice pursuant to Rule 36(a) was mailed to counsel of record or to the parties, at their last address of record with the Court, on July 20, 19 87. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 2d day of Sept., 19____.

James O. Ellison
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUPERIOR HARD-SURFACING COMPANY, INC., an Oklahoma corporation, and HAROLD WEST, Trustee of the Superior Hard-Surfacing Company Inc. Pension Plan Plaintiffs, v. CONTINENTAL ASSURANCE COMPANY, an Illinois corporation, MORTON & COMPANY, INC., an Arkansas corporation, MORTON AND COMPANY RETIREMENT DIVISION, INC., an Arkansas corporation, ACTUARIAL ASSOCIATES OF AMERICA - LITTLE ROCK, INC., an Arkansas corporation, MORTON PENSION ADMINISTRATION SYSTEMS, INC. an Arkansas corporation, WILLIAM C. MORTON, JR., and GEORGE B. MORTON, Defendants.	)	Case No. 87-C-588-C

JOURNAL ENTRY OF JUDGMENT

Defendant, Continental Assurance Company, has been regularly served with process. It has failed to appear and answer the Plaintiff's Complaint filed herein. The default of defendant has been entered. It appears that defendant is not an infant or incompetent person. It appears from the Affidavit that the Plaintiff is entitled to judgment.

IT IS ORDERED AND ADJUDGED that plaintiff recover from defendant the sum of ONE HUNDRED SIXTY THOUSAND AND NO/100 DOLLARS ($160,000.00), with interest thereon at the rate of 13.16% per annum from December 31, 1984 until paid, together with

costs, ~~in the sum of $5,000.00~~.

DATED the 2 day of Sept, 1987.

(Signed) H. Dale Cook

~~JACK C. GILVER, COURT CLERK~~

JUDGE OF THE DISTRICT COURT

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVE NEKO STEWARD, Petitioner,	)	
v.	)	86-C-559-E
STATE OF OKLAHOMA; JOHN GRUBBS, WARDEN, M.H.A. CORRECTIONAL CENTER; and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	

ORDER

The Court has for consideration the Findings and Recommendation of the Magistrate filed August 11, 1987, in which the Magistrate recommended that petitioner's application for a writ of habeas corpus be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Findings and Recommendation of the Magistrate should be and hereby are affirmed.

It is Ordered that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is denied.

Dated this 2d day of Sept., 1987.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

11.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

ROGER DALE BILYEU, GERALYN BILYEU, husband and wife, and RAY BILYEU,

Plaintiffs,

vs.

RONALD RAY COWAN,

Defendant.

No. 86-C-433 B

ORDER OF DISMISSAL

This matter came on for consideration on this 2nd day of ~~August,~~ September, 1987 upon the Joint Application For Dismissal With Prejudice filed herein. The Court being duly advised in the premises, finds that said Application For Dismissal is in the best interest of justice and should be approved, and the above styled and numbered cause of action dismissed with prejudice to a refiling.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Joint Application For Dismissal With Prejudice by the parties be and the same is hereby approved, and the above styled and numbered cause of action and Complaint is dismissed with prejudice to a refiling.

S/ THOMAS R. BRETT

THOMAS R. BRETT, JUDGE
UNITED STATES DISTRICT COURT

Approved:

Bruce A. Swenson
Attorney for plaintiffs

Donald Church
Attorney for the defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 2 1987

Jack C. Silver, Clerk
U.S. DISTRICT COURT

PEARL WARE, Deceased, by and through her Administratrix, RUTH GILCREASE, et al.,

Plaintiffs,

vs.

GAYMAR INDUSTRIES, INC., and OMNICARE,

Defendants.

No. 85-C-1095-E

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown. Settlement papers are to be filed with the Court on or before September 15, 1987.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this judgment by United States mail upon the attorneys for the parties appearing in this action.

DATED this 2nd day of September, 1987.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

BANK OF OKLAHOMA, GROVE, Plaintiff,	)	
vs.	)	Case No. 86-C-1010C
WAL-MART STORES, INC., Defendant,	)	
and	)	
WAL-MART STORES, INC., Third Party Plaintiff,	)	
vs.	)	
RICHARD R. SMITH, Third Party Defendant.	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Bank of Oklahoma, Grove, the Defendant and Third Party Plaintiff, Wal-Mart Stores, Inc., and the Third Party Defendant, Richard R. Smith, advise the Court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), Fed. Rules Civil Procedure, jointly stipulate that the Complaint of Bank of Oklahoma, Grove against Wal-Mart Stores, Inc. be dismissed with prejudice. The Plaintiff, Defendant and Third Party Plaintiff, and the Third Party Defendant jointly stipulate that the Cross-Petition of Wal-Mart Stores, Inc. against Bank of Oklahoma, Grove, be dismissed with prejudice. The Plaintiff,

Defendant and Third Party Plaintiff, and the Third Party Defendant jointly stipulate that the Third Party Complaint of Wal-Mart Stores, Inc. against Richard R. Smith be dismissed with prejudice. All parties further agree to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 29th day of May, 1987.

ROSENSTEIN, FIST & RINGOLD

By _____
Jon B. Comstock, OBA #1836
525 So. Main, Suite 300
Tulsa, Oklahoma 74103
(918) 585-9211

Attorneys for Defendant and
Third Party Plaintiff,
Wal-Mart Stores, Inc.

HOLLIMAN, LANGHOLZ, RUNNELS & DORWART

By _____
Gregory A. Guerrero, OBA # 3653
Holarud Building, Suite 700
10 E. 3rd St.
Tulsa, Oklahoma 74103
(918) 584-1471

Attorneys for Plaintiff,
Bank of Oklahoma, Grove

DAVIS & THOMPSON

By _____
Phil Thompson, OBA # ____
P. O. Drawer 487
Jay, Oklahoma 74346
(918) 253-4298

Attorneys for Richard R. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHELTER MUTUAL INSURANCE COMPANY,

Plaintiff,

vs.

TOM OGDON, et al.,

Defendants.

No. 87-C-139-E

JUDGMENT

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff, Shelter Mutual Insurance Company, recover judgment of the Defendants Tom Ogdon, James O. Wilde, father and next friend of Jamie Janice Wilde, and Larry Erbe, father and next friend of Brandy Erbe, that the declaratory judgment be entered as against Defendants that the homeowner's policy of insurance issued by Plaintiff to Defendant Tom Ogdon excludes Defendant Tom Ogdon's activities as minister of First Assembly of God Church, Inc., and that Plaintiff be awarded its costs of action.

DATED at Tulsa, Oklahoma this 2d day of September, 1987.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHELTON CLEVELAND POWELL, JR., Petitioner,	)	
v.	)	87-C-1-B
LARRY MEACHUM and The Attorney General of the State of Oklahoma, Respondents.	)	

ORDER

Petitioner Shelton Cleveland Powell Jr.'s application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is now before the court for determination. Through his application petitioner attempts to challenge his Tulsa County District Court convictions for Armed Robbery in Case Nos. CRF-73-2566, CRF-73-2567, CRF-73-2568, and CRF-73-2569. The records of the Oklahoma Department of Corrections show that petitioner's paroles on the above-numbered cases were allowed to expire. He is no longer in custody pursuant to those convictions.

Petitioner states that he is currently in the custody of the Texas Department of Corrections, serving a sentence for Aggravated Robbery. He alleges that during his trial in Dallas County, Texas, the prosecution brought into evidence petitioner's Oklahoma convictions. He further alleges that these convictions were used to enhance his Texas sentence.

The federal habeas corpus statute provides that the applicant must be "in custody" when the application for habeas corpus is filed. At the time petitioner filed his application,

he was not "in custody" under the convictions he now seeks to attack. However, petitioner satisfies the "in custody" requirement if there is "a positive, demonstrable relationship" between the challenged convictions and the petitioner's present incarceration. See, Escobedo v. Estelle, 655 F.2d 613 (5th Cir. 1981) (and cases cited therein).

The court finds that petitioner has sufficiently alleged a relationship between his Tulsa County convictions and his incarceration in Texas, therefore petitioner is considered to be "in custody" for purposes of §2254, and the court has jurisdiction to consider petitioner's habeas corpus application.

Turning to the merits of the application, petitioner first alleges that he was subjected to double jeopardy. This claim, however, is without merit. The constitutional prohibition of double jeopardy protects a criminal defendant in three situations: against a second prosecution for the same offense after acquittal; against a second prosecution for the same offense after conviction; and against multiple punishments for the same offense.

Petitioner argues that he and his co-defendant only intended to rob one convenience store. During the robbery three customers came in and the co-defendant demanded their money. Petitioner states that he should only have been charged with one count of robbery because the four robberies occurred at the same place and as part of the same transaction.

A criminal defendant may be convicted of two or more charges, even though the charges arise from the same transaction

or series of events, if each charge requires proof of a fact that the other(s) do not. United States v. Cotton, 646 F.2d 430 (10th Cir. 1981) cert. denied, 454 U.S. 861, 102 S.Ct. 316, 70 L.Ed.2d 159.

Although not directly on point in petitioner's situation, the court finds the longstanding rule of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to be instructive here. The Blockburger rule provides that "... where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not."

Petitioner was charged with four counts of robbery. Proof necessary to convict petitioner of robbery of the convenience store requires different facts from the proof necessary for a conviction of robbery of victim A, or B, or C. Therefore, the court concludes that petitioner was properly charged with separate counts of robbery, even though the robberies formed one series of events. United States v. Cotton, supra.

As his second ground petitioner asserts that he was denied his Sixth Amendment right to effective assistance of counsel. In support of this claim petitioner states that his counsel represented both petitioner and his co-defendant; that counsel failed to investigate the crime, call witnesses, or file appropriate pretrial motions; and that counsel pressured petitioner to plead guilty and arranged for petitioner to receive a more severe sentence than the co-defendant.

The state record as submitted does not contain any documentation of the plea hearing in petitioner's armed robbery cases. The court finds that before a fair determination can be made on petitioner's claim of ineffective assistance of counsel, it must review the transcript of petitioner's plea hearing. The respondents are therefore ordered to advise the court within twenty (20) days whether such transcripts exist, and when they can be furnished to the court.

In his reply to the State's response, filed July 7, 1987, petitioner conceded that he was not entitled to habeas corpus relief based upon his third asserted ground that the State failed to provide a transcript for his post-conviction application. Therefore, the court will not further consider this claim.

Finally, the respondents urge the court to dismiss defendant Larry Meachum from this action because, as the Director of the Oklahoma Department of Corrections, he is not the custodian of petitioner. Respondents' position is well-taken. Federal habeas relief can only be sought against the official who has physical control over the applicant. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); Moore v. United States, 339 F.2d 448 (10th Cir. 1964).

It is therefore ordered that Larry Meachum be dismissed as a defendant in this action. It is further ordered that petitioner's application for habeas corpus relief be denied as to grounds one and three. Respondents are ordered to submit a statement as to the availability of a plea hearing transcript as directed above.

Dated this 2nd day of September, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, Plaintiff, v. ROBERT K. BELL ENTERPRISES, INC., et al., Defendants.	No. 87-C-687 B

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, the Federal Deposit Insurance Corporation, in its corporate capacity, and pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, dismisses its claims against the Defendants, Action Leasing, Inc. and North American Credit Service, Inc., without prejudice.

Joel R. Hogue

Theodore Q. Eliot
Joel R. Hogue
GABLE & GOTWALS
2000 Fourth National Bank Building
Tulsa, OK 74119-1217
(918) 582-9201

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of September, 1987, a true, exact and correct copy of the above and foregoing instrument was mailed, postage prepaid, to the following:

Bradford S. Baker
702 Atlas Life Bldg.
Tulsa, OK 74103

Joel R. Hogue

Joel R. Hogue

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ADAM WAYNE STERLING,

Plaintiff,

v.

JAY DEAN DALTON, a/k/a J. DALTON, a/k/a JAY DALTON, CLIFFORD HOPPER, Both Tulsa Co. Dist. Judges, and FRANK THURMAN, SHERIFF, Tulsa, County, Okla.,

Defendants.

86-C-763-B

ADAM WAYNE STERLING,

Plaintiff,

v.

JOHN DOE, Commissioner/ Director, State of Oklahoma Department of Health,

Defendant.

86-C-800-B

ADAM WAYNE STERLING,

Plaintiff,

v.

UNITED STATES OF AMERICA, [U.S.D.C./No. Dist. Ok],

Defendant.

86-C-801-B

ADAM WAYNE STERLING, Plaintiff, v. FRANK THURMAN, SHERIFF, TULSA COUNTY; JOHN DOE, WARDEN, TULSA CITY-COUNTY JAIL; CITY OF TULSA; COUNTY OF TULSA; JOHN/JANE DOE, REGISTERED AGENT; SOUTHWESTERN BELL TELEPHONE COMPANY, Defendants.	)	86-C-803-B

ADAM WAYNE STERLING, Plaintiff, v. GEORGE GRIGSBY, FRANK THURMAN, THREE JOHN DOES, ONE COUNTY COMMISSIONER, THREE JOHN DOES, CITY OF TULSA, Defendants.	)	86-C-804-B

ADAM WAYNE STERLING, Plaintiff, v. JOHN PILANT, FRANK THURMAN, & JOHN DOE a/k/a "DR. LOVE", AND CITY OF TULSA, OKLAHOMA & COUNTY OF TULSA COUNTY, OKLAHOMA, Defendants.	)	86-C-805-B

ADAM WAYNE STERLING, Plaintiff, v. CITY OF TULSA, (various John/Jane Does); COUNTY OF TULSA, (various John/Jane Does); FRANK THURMAN, Defendants.	)	86-C-806-B Consolidated

ORDER

This action is a consolidation of seven separate civil rights complaints instituted by the plaintiff, Adam Wayne Sterling, pursuant to 42 U.S.C. §1983. In each of the seven individual actions, a Motion for Leave to Proceed In Forma Pauperis was filed at the outset and granted by the court. Several summons have been served. A special report was ordered by the court and was filed April 7, 1987, along with the Answers of defendants Jay Dalton, Clifford Hopper, and Frank Thurman.

To ensure that the privilege of proceeding in forma pauperis is not abused, Congress authorized dismissal of an in forma pauperis proceeding where the court finds an action is frivolous or malicious. Title 28 U.S.C. §1915(d); Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981). If the frivolousness of the complaint is not facially apparent, it is incumbent upon the court to develop the case and to sift the claims and known facts thoroughly until completely satisfied either of its merit or lack of merit. Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986).

One method approved by the Tenth Circuit for developing the record is the special report. Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). Because there are compelling reasons for allowing courts broader dismissal powers in in forma pauperis suits (Jones v. Bales, 58 F.R.D. 453, 463 (N.D.Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973)[1], dismissal under §1915(d) is appropriate whenever it becomes clear that an in forma pauperis complaint is without merit. Cay, supra, at 324.

A complaint is "frivolous" as that term is used in §1915(d) when the plaintiff cannot make a rational argument on the law or the facts to support his claim. Henriksen, supra, at 853. Applying this test to Mr. Sterling's complaints, the court finds that all of former Case Nos. 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C should be dismissed as frivolous for the following reasons.

A. Case No. 86-C-763-B

In Counts II and III of plaintiff's original complaint under Case No. 86-C-763-B, it appears to the court that plaintiff's allegations are directed toward defendant Jay Dalton (a District Judge of the District Court of Tulsa County, Oklahoma). Although not altogether clear, the allegations apparently concern the

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[1] Persons proceeding in forma pauperis are immune from imposition of costs, and practically immune from later tort actions for "malicious prosecution"; in forma pauperis plaintiffs approach the courts with nothing to lose and everything to gain, if nothing more than a short sabbatical in the nearest federal courthouse; the temptation to file complaints that contain facts that cannot be proven is obviously stronger in such a situation.

manner in which Judge Dalton handled various aspects of plaintiff's state criminal trial, and the suppression of evidence by Judge Dalton and/or Tulsa County District Court Judge Clifford Hopper. As such, plaintiff's complaint is totally without merit in the context of a civil rights action. It has been well settled since 1869 (Randall v. Brigham, 7 Wall. 523) that a judge cannot be held responsible to private parties in civil actions for their judicial acts, however injurious may be those acts, except when they act in clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 357, 98 S.Ct. 1099, 55 L.Ed.2d 331, reh'g denied, 436 U.S. 951, 98 S. Ct. 2862, 56 L.Ed.2d 795 (1978); Van Sickle v. Holloway, 791 F.2d 1431 (10th Cir. 1986). It appearing to this court that the judicial defendants were acting within their jurisdiction, Counts II and III will be dismissed as frivolous. As to Count I, plaintiff makes no claim for relief but merely cites several sections from the United States and Oklahoma Constitutions. Plaintiff also refers to a narrative statement, not of record, in support of Count I. Because Count I also fails the §1915(d) test for frivolousness, it must also be dismissed.

B. Case No. 86-C-800-C

In plaintiff's complaint originally filed under Case No. 86-C-800-C, plaintiff alleges in Count I that an unnamed "commissioner/ director" refused to amend plaintiff's birth certificate to reflect plaintiff's "common law name change". Assuming the plaintiff is referring to the Director of Oklahoma's

Department of Health as set forth in the style of the complaint, this court knows of no right embodied in the United States Constitution protecting plaintiff's desire to have his name change reflected in the State's birth records, absent plaintiff's prior resort to Oklahoma's statutory procedure for name changes, found at Title 12 O.S. §§1631-40 (1986). Plaintiff's complaint against the Director must be dismissed as being without merit for the reason that plaintiff cannot make a rational argument on the law or these facts stating a claim cognizable under §1983.

In Counts II and III plaintiff apparently seeks a declaratory judgment declaring Oklahoma's Name Change Act unconstitutional. However, this court will decline to rule on the constitutionality of a state statute in advance of its application and construction by the state courts, and without reference to some precise set of facts to which it is to be applied. Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). Therefore, Counts II and III will be dismissed.

C. Case No. 86-C-801-E

In plaintiff's complaint originally filed under Case No. 86-C-801-E, plaintiff alleges in Counts II and III that defendant James O. Ellison (United States District Judge, Northern District of Oklahoma) violated plaintiff's rights by denying plaintiff an appeal bond in a federal criminal proceeding (85-CR-123-E). Applying the same doctrine of judicial immunity to plaintiff's allegations against defendant Ellison, plaintiff can make no

rational argument for relief on the law or these facts and for this reason, Counts II and III must be dismissed. Van Sickle, supra, at 1435. In Count I plaintiff fails to allege a constitutional violation by any defendant, named or unnamed, complaining instead in general terms about the Bail Reform Act of 1984. Count I must also be dismissed as frivolous.

D. Case No. 86-C-804-C

In the complaint originally filed under Case No. 86-C-804-C, plaintiff alleges in Count I that "food available or procured apparently is not reaching [the] prison population." Even construed liberally, plaintiff has not made a claim or alleged facts in Count I sufficient to raise a constitutional claim of cruel and unusual punishment (Ramos v. Lamb, 639 F.2d 559, 571 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981)). Therefore, plaintiff's claim must be dismissed as without merit.

In Counts II and III, plaintiff's allegations, construed liberally, make out a viable §1983 claim against defendants George Grigsby, Frank Thurman, and the Tulsa County Commissioners. However, it appearing to the court that the City of Tulsa does not supervise the Tulsa City-County Jail (See, Affidavit of David L. Pauling, Assistant City Attorney, filed October 28, 1986), plaintiff's claims against the City of Tulsa Commissioners should be dismissed as frivolous both in this complaint, and in the complaint originally filed as Case No.

86-C-803-B (alleging denial of telephonic access to the courts, counsel, and family while incarcerated in the Tulsa City-County Jail).

E. Case No. 86-C-805-E

In the complaint originally filed under Case No. 86-C-805-E, Counts I, II, and III contain little more than general allegations of inadequate dental care provided for the general inmate population within the Tulsa City-County Jail system. Plaintiff does not, however, allege personal harm or deprivation. Furthermore, none of the allegations of harm or deprivation appears facially to rise to the level of a constitutional violation. Thus, Counts I, II, and III should be dismissed as without merit.

F. Case No. 86-C-806-B

In plaintiff's last complaint, originally filed under Case No. 86-C-806-B, plaintiff attacks the constitutionality of the Tulsa City-County Jail system's provision for access to the courts, legal materials, and counsel. In Clayton v. Thurman, Case No. 79-C-723-B, this court determined that the Tulsa City-County Jail complies with constitutional standards regarding access to courts, legal materials, and counsel. Plaintiff is a member of the plaintiffs certified as a class in Clayton. Consequently, plaintiff's claims in Case No. 86-C-806-B, insofar as they seek declaratory and injunctive relief, are barred by the application of res judicata.

Regarding plaintiff's claims for damages, plaintiff is prevented from relitigating the constitutionality of the system Tulsa City-County Jail uses to provide inmates access to the courts, legal materials, and counsel, by the doctrine of collateral estoppel. Crowder v. Lash, 687 F.2d 996, 1009 (7th Cir. 1982). Since plaintiff has not alleged that his interests were inadequately represented by the class representative, his claims are without merit and should be dismissed. Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978).

Since a review of the complaints filed originally as 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C, does not indicate that plaintiff can make a rational argument on the law or the facts sufficient to bring his claims within the ambit of a §1983 action, it is the order of this court that the above actions be dismissed, pursuant to this court's review under 28 U.S.C. §1915(d). Furthermore, the remaining defendants in the actions originally filed as 86-C-803-B and in Counts II and III of 86-C-804-C are hereby given an additional twenty (20) days from this date to file answers or otherwise plead to plaintiff's complaints.

Dated this 17th day of Sept, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ADAM WAYNE STERLING, Plaintiff, v. JAY DEAN DALTON, a/k/a J. DALTON, a/k/a JAY DALTON, CLIFFORD HOPPER, Both Tulsa Co. Dist. Judges, and FRANK THURMAN, SHERIFF, Tulsa, County, Okla., Defendants.	)	86-C-763-B

ADAM WAYNE STERLING, Plaintiff, v. JOHN DOE, Commissioner/ Director, State of Oklahoma Department of Health, Defendant.	)	86-C-800-B

ADAM WAYNE STERLING, Plaintiff, v. UNITED STATES OF AMERICA, [U.S.D.C./No. Dist. Ok], Defendant.	)	86-C-801-B

ADAM WAYNE STERLING, Plaintiff, v. FRANK THURMAN, SHERIFF, TULSA COUNTY; JOHN DOE, WARDEN, TULSA CITY-COUNTY JAIL; CITY OF TULSA; COUNTY OF TULSA; JOHN/JANE DOE, REGISTERED AGENT; SOUTHWESTERN BELL TELEPHONE COMPANY, Defendants.	)	86-C-803-B

ADAM WAYNE STERLING, Plaintiff, v. GEORGE GRIGSBY, FRANK THURMAN, THREE JOHN DOES, ONE COUNTY COMMISSIONER, THREE JOHN DOES, CITY OF TULSA, Defendants.	)	86-C-804-B

ADAM WAYNE STERLING, Plaintiff, v. JOHN PILANT, FRANK THURMAN, & JOHN DOE a/k/a "DR. LOVE", AND CITY OF TULSA, OKLAHOMA & COUNTY OF TULSA COUNTY, OKLAHOMA, Defendants.	)	86-C-805-B

ADAM WAYNE STERLING, Plaintiff, v. CITY OF TULSA, (various John/Jane Does); COUNTY OF TULSA, (various John/Jane Does); FRANK THURMAN, Defendants.	)	86-C-806-B Consolidated

ORDER

This action is a consolidation of seven separate civil rights complaints instituted by the plaintiff, Adam Wayne Sterling, pursuant to 42 U.S.C. §1983. In each of the seven individual actions, a Motion for Leave to Proceed In Forma Pauperis was filed at the outset and granted by the court. Several summons have been served. A special report was ordered by the court and was filed April 7, 1987, along with the Answers of defendants Jay Dalton, Clifford Hopper, and Frank Thurman.

To ensure that the privilege of proceeding in forma pauperis is not abused, Congress authorized dismissal of an in forma pauperis proceeding where the court finds an action is frivolous or malicious. Title 28 U.S.C. §1915(d); Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981). If the frivolousness of the complaint is not facially apparent, it is incumbent upon the court to develop the case and to sift the claims and known facts thoroughly until completely satisfied either of its merit or lack of merit. Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986).

One method approved by the Tenth Circuit for developing the record is the special report. Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). Because there are compelling reasons for allowing courts broader dismissal powers in in forma pauperis suits (Jones v. Bales, 58 F.R.D. 453, 463 (N.D.Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973)[1], dismissal under §1915(d) is appropriate whenever it becomes clear that an in forma pauperis complaint is without merit. Cay, supra, at 324.

A complaint is "frivolous" as that term is used in §1915(d) when the plaintiff cannot make a rational argument on the law or the facts to support his claim. Henriksen, supra, at 853. Applying this test to Mr. Sterling's complaints, the court finds that all of former Case Nos. 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C should be dismissed as frivolous for the following reasons.

A. Case No. 86-C-763-B

In Counts II and III of plaintiff's original complaint under Case No. 86-C-763-B, it appears to the court that plaintiff's allegations are directed toward defendant Jay Dalton (a District Judge of the District Court of Tulsa County, Oklahoma). Although not altogether clear, the allegations apparently concern the

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manner in which Judge Dalton handled various aspects of plaintiff's state criminal trial, and the suppression of evidence by Judge Dalton and/or Tulsa County District Court Judge Clifford Hopper. As such, plaintiff's complaint is totally without merit in the context of a civil rights action. It has been well settled since 1869 (Randall v. Brigham, 7 Wall. 523) that a judge cannot be held responsible to private parties in civil actions for their judicial acts, however injurious may be those acts, except when they act in clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 357, 98 S.Ct. 1099, 55 L.Ed.2d 331, reh'g denied, 436 U.S. 951, 98 S. Ct. 2862, 56 L.Ed.2d 795 (1978); Van Sickle v. Holloway, 791 F.2d 1431 (10th Cir. 1986). It appearing to this court that the judicial defendants were acting within their jurisdiction, Counts II and III will be dismissed as frivolous. As to Count I, plaintiff makes no claim for relief but merely cites several sections from the United States and Oklahoma Constitutions. Plaintiff also refers to a narrative statement, not of record, in support of Count I. Because Count I also fails the §1915(d) test for frivolousness, it must also be dismissed.

B. Case No. 86-C-800-C

In plaintiff's complaint originally filed under Case No. 86-C-800-C, plaintiff alleges in Count I that an unnamed "commissioner/ director" refused to amend plaintiff's birth certificate to reflect plaintiff's "common law name change". Assuming the plaintiff is referring to the Director of Oklahoma's

Department of Health as set forth in the style of the complaint, this court knows of no right embodied in the United States Constitution protecting plaintiff's desire to have his name change reflected in the State's birth records, absent plaintiff's prior resort to Oklahoma's statutory procedure for name changes, found at Title 12 O.S. §§1631-40 (1986). Plaintiff's complaint against the Director must be dismissed as being without merit for the reason that plaintiff cannot make a rational argument on the law or these facts stating a claim cognizable under §1983.

In Counts II and III plaintiff apparently seeks a declaratory judgment declaring Oklahoma's Name Change Act unconstitutional. However, this court will decline to rule on the constitutionality of a state statute in advance of its application and construction by the state courts, and without reference to some precise set of facts to which it is to be applied. Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). Therefore, Counts II and III will be dismissed.

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In plaintiff's complaint originally filed under Case No. 86-C-801-E, plaintiff alleges in Counts II and III that defendant James O. Ellison (United States District Judge, Northern District of Oklahoma) violated plaintiff's rights by denying plaintiff an appeal bond in a federal criminal proceeding (85-CR-123-E). Applying the same doctrine of judicial immunity to plaintiff's allegations against defendant Ellison, plaintiff can make no

rational argument for relief on the law or these facts and for this reason, Counts II and III must be dismissed. Van Sickle, supra, at 1435. In Count I plaintiff fails to allege a constitutional violation by any defendant, named or unnamed, complaining instead in general terms about the Bail Reform Act of 1984. Count I must also be dismissed as frivolous.

D. Case No. 86-C-804-C

In the complaint originally filed under Case No. 86-C-804-C, plaintiff alleges in Count I that "food available or procured apparently is not reaching [the] prison population." Even construed liberally, plaintiff has not made a claim or alleged facts in Count I sufficient to raise a constitutional claim of cruel and unusual punishment (Ramos v. Lamb, 639 F.2d 559, 571 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981)). Therefore, plaintiff's claim must be dismissed as without merit.

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86-C-803-B (alleging denial of telephonic access to the courts, counsel, and family while incarcerated in the Tulsa City-County Jail).

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In the complaint originally filed under Case No. 86-C-805-E, Counts I, II, and III contain little more than general allegations of inadequate dental care provided for the general inmate population within the Tulsa City-County Jail system. Plaintiff does not, however, allege personal harm or deprivation. Furthermore, none of the allegations of harm or deprivation appears facially to rise to the level of a constitutional violation. Thus, Counts I, II, and III should be dismissed as without merit.

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In plaintiff's last complaint, originally filed under Case No. 86-C-806-B, plaintiff attacks the constitutionality of the Tulsa City-County Jail system's provision for access to the courts, legal materials, and counsel. In Clayton v. Thurman, Case No. 79-C-723-B, this court determined that the Tulsa City-County Jail complies with constitutional standards regarding access to courts, legal materials, and counsel. Plaintiff is a member of the plaintiffs certified as a class in Clayton. Consequently, plaintiff's claims in Case No. 86-C-806-B, insofar as they seek declaratory and injunctive relief, are barred by the application of res judicata.

Regarding plaintiff's claims for damages, plaintiff is prevented from relitigating the constitutionality of the system Tulsa City-County Jail uses to provide inmates access to the courts, legal materials, and counsel, by the doctrine of collateral estoppel. Crowder v. Lash, 687 F.2d 996, 1009 (7th Cir. 1982). Since plaintiff has not alleged that his interests were inadequately represented by the class representative, his claims are without merit and should be dismissed. Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978).

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Dated this 1st day of Sept, 1987.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ADAM WAYNE STERLING, Plaintiff, v. JAY DEAN DALTON, a/k/a J. DALTON, a/k/a JAY DALTON, CLIFFORD HOPPER, Both Tulsa Co. Dist. Judges, and FRANK THURMAN, SHERIFF, Tulsa, County, Okla., Defendants.	)	86-C-763-B

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ADAM WAYNE STERLING, Plaintiff, v. CITY OF TULSA, (various John/Jane Does); COUNTY OF TULSA, (various John/Jane Does); FRANK THURMAN, Defendants.	)	86-C-806-B Consolidated

ORDER

This action is a consolidation of seven separate civil rights complaints instituted by the plaintiff, Adam Wayne Sterling, pursuant to 42 U.S.C. §1983. In each of the seven individual actions, a Motion for Leave to Proceed In Forma Pauperis was filed at the outset and granted by the court. Several summons have been served. A special report was ordered by the court and was filed April 7, 1987, along with the Answers of defendants Jay Dalton, Clifford Hopper, and Frank Thurman.

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In the complaint originally filed under Case No. 86-C-804-C, plaintiff alleges in Count I that "food available or procured apparently is not reaching [the] prison population." Even construed liberally, plaintiff has not made a claim or alleged facts in Count I sufficient to raise a constitutional claim of cruel and unusual punishment (Ramos v. Lamb, 639 F.2d 559, 571 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981)). Therefore, plaintiff's claim must be dismissed as without merit.

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In the complaint originally filed under Case No. 86-C-805-E, Counts I, II, and III contain little more than general allegations of inadequate dental care provided for the general inmate population within the Tulsa City-County Jail system. Plaintiff does not, however, allege personal harm or deprivation. Furthermore, none of the allegations of harm or deprivation appears facially to rise to the level of a constitutional violation. Thus, Counts I, II, and III should be dismissed as without merit.

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Regarding plaintiff's claims for damages, plaintiff is prevented from relitigating the constitutionality of the system Tulsa City-County Jail uses to provide inmates access to the courts, legal materials, and counsel, by the doctrine of collateral estoppel. Crowder v. Lash, 687 F.2d 996, 1009 (7th Cir. 1982). Since plaintiff has not alleged that his interests were inadequately represented by the class representative, his claims are without merit and should be dismissed. Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978).

Since a review of the complaints filed originally as 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C, does not indicate that plaintiff can make a rational argument on the law or the facts sufficient to bring his claims within the ambit of a §1983 action, it is the order of this court that the above actions be dismissed, pursuant to this court's review under 28 U.S.C. §1915(d). Furthermore, the remaining defendants in the actions originally filed as 86-C-803-B and in Counts II and III of 86-C-804-C are hereby given an additional twenty (20) days from this date to file answers or otherwise plead to plaintiff's complaints.

Dated this 1st day of Sept, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ADAM WAYNE STERLING, Plaintiff, v. JAY DEAN DALTON, a/k/a J. DALTON, a/k/a JAY DALTON, CLIFFORD HOPPER, Both Tulsa Co. Dist. Judges, and FRANK THURMAN, SHERIFF, Tulsa, County, Okla., Defendants.	)	86-C-763-B
ADAM WAYNE STERLING, Plaintiff, v. JOHN DOE, Commissioner/ Director, State of Oklahoma Department of Health, Defendant.	)	86-C-800-B
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ADAM WAYNE STERLING,

Plaintiff,

v.

CITY OF TULSA, (various John/Jane Does); COUNTY OF TULSA, (various John/Jane Does); FRANK THURMAN,

Defendants.

86-C-806-B

Consolidated

ORDER

This action is a consolidation of seven separate civil rights complaints instituted by the plaintiff, Adam Wayne Sterling, pursuant to 42 U.S.C. §1983. In each of the seven individual actions, a Motion for Leave to Proceed In Forma Pauperis was filed at the outset and granted by the court. Several summons have been served. A special report was ordered by the court and was filed April 7, 1987, along with the Answers of defendants Jay Dalton, Clifford Hopper, and Frank Thurman.

To ensure that the privilege of proceeding in forma pauperis is not abused, Congress authorized dismissal of an in forma pauperis proceeding where the court finds an action is frivolous or malicious. Title 28 U.S.C. §1915(d); Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981). If the frivolousness of the complaint is not facially apparent, it is incumbent upon the court to develop the case and to sift the claims and known facts thoroughly until completely satisfied either of its merit or lack of merit. Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986).

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A complaint is "frivolous" as that term is used in §1915(d) when the plaintiff cannot make a rational argument on the law or the facts to support his claim. Henriksen, supra, at 853. Applying this test to Mr. Sterling's complaints, the court finds that all of former Case Nos. 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C should be dismissed as frivolous for the following reasons.

A. Case No. 86-C-763-B

In Counts II and III of plaintiff's original complaint under Case No. 86-C-763-B, it appears to the court that plaintiff's allegations are directed toward defendant Jay Dalton (a District Judge of the District Court of Tulsa County, Oklahoma). Although not altogether clear, the allegations apparently concern the

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manner in which Judge Dalton handled various aspects of plaintiff's state criminal trial, and the suppression of evidence by Judge Dalton and/or Tulsa County District Court Judge Clifford Hopper. As such, plaintiff's complaint is totally without merit in the context of a civil rights action. It has been well settled since 1869 (Randall v. Brigham, 7 Wall. 523) that a judge cannot be held responsible to private parties in civil actions for their judicial acts, however injurious may be those acts, except when they act in clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 357, 98 S.Ct. 1099, 55 L.Ed.2d 331, reh'g denied, 436 U.S. 951, 98 S. Ct. 2862, 56 L.Ed.2d 795 (1978); Van Sickle v. Holloway, 791 F.2d 1431 (10th Cir. 1986). It appearing to this court that the judicial defendants were acting within their jurisdiction, Counts II and III will be dismissed as frivolous. As to Count I, plaintiff makes no claim for relief but merely cites several sections from the United States and Oklahoma Constitutions. Plaintiff also refers to a narrative statement, not of record, in support of Count I. Because Count I also fails the §1915(d) test for frivolousness, it must also be dismissed.

B. Case No. 86-C-800-C

In plaintiff's complaint originally filed under Case No. 86-C-800-C, plaintiff alleges in Count I that an unnamed "commissioner/ director" refused to amend plaintiff's birth certificate to reflect plaintiff's "common law name change". Assuming the plaintiff is referring to the Director of Oklahoma's

Department of Health as set forth in the style of the complaint, this court knows of no right embodied in the United States Constitution protecting plaintiff's desire to have his name change reflected in the State's birth records, absent plaintiff's prior resort to Oklahoma's statutory procedure for name changes, found at Title 12 O.S. §§1631-40 (1986). Plaintiff's complaint against the Director must be dismissed as being without merit for the reason that plaintiff cannot make a rational argument on the law or these facts stating a claim cognizable under §1983.

In Counts II and III plaintiff apparently seeks a declaratory judgment declaring Oklahoma's Name Change Act unconstitutional. However, this court will decline to rule on the constitutionality of a state statute in advance of its application and construction by the state courts, and without reference to some precise set of facts to which it is to be applied. Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). Therefore, Counts II and III will be dismissed.

C. Case No. 86-C-801-E

In plaintiff's complaint originally filed under Case No. 86-C-801-E, plaintiff alleges in Counts II and III that defendant James O. Ellison (United States District Judge, Northern District of Oklahoma) violated plaintiff's rights by denying plaintiff an appeal bond in a federal criminal proceeding (85-CR-123-E). Applying the same doctrine of judicial immunity to plaintiff's allegations against defendant Ellison, plaintiff can make no

rational argument for relief on the law or these facts and for this reason, Counts II and III must be dismissed. Van Sickle, supra, at 1435. In Count I plaintiff fails to allege a constitutional violation by any defendant, named or unnamed, complaining instead in general terms about the Bail Reform Act of 1984. Count I must also be dismissed as frivolous.

D. Case No. 86-C-804-C

In the complaint originally filed under Case No. 86-C-804-C, plaintiff alleges in Count I that "food available or procured apparently is not reaching [the] prison population." Even construed liberally, plaintiff has not made a claim or alleged facts in Count I sufficient to raise a constitutional claim of cruel and unusual punishment (Ramos v. Lamb, 639 F.2d 559, 571 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981)). Therefore, plaintiff's claim must be dismissed as without merit.

In Counts II and III, plaintiff's allegations, construed liberally, make out a viable §1983 claim against defendants George Grigsby, Frank Thurman, and the Tulsa County Commissioners. However, it appearing to the court that the City of Tulsa does not supervise the Tulsa City-County Jail (See, Affidavit of David L. Pauling, Assistant City Attorney, filed October 28, 1986), plaintiff's claims against the City of Tulsa Commissioners should be dismissed as frivolous both in this complaint, and in the complaint originally filed as Case No.

86-C-803-B (alleging denial of telephonic access to the courts, counsel, and family while incarcerated in the Tulsa City-County Jail).

E. Case No. 86-C-805-E

In the complaint originally filed under Case No. 86-C-805-E, Counts I, II, and III contain little more than general allegations of inadequate dental care provided for the general inmate population within the Tulsa City-County Jail system. Plaintiff does not, however, allege personal harm or deprivation. Furthermore, none of the allegations of harm or deprivation appears facially to rise to the level of a constitutional violation. Thus, Counts I, II, and III should be dismissed as without merit.

F. Case No. 86-C-806-B

In plaintiff's last complaint, originally filed under Case No. 86-C-806-B, plaintiff attacks the constitutionality of the Tulsa City-County Jail system's provision for access to the courts, legal materials, and counsel. In Clayton v. Thurman, Case No. 79-C-723-B, this court determined that the Tulsa City-County Jail complies with constitutional standards regarding access to courts, legal materials, and counsel. Plaintiff is a member of the plaintiffs certified as a class in Clayton. Consequently, plaintiff's claims in Case No. 86-C-806-B, insofar as they seek declaratory and injunctive relief, are barred by the application of res judicata.

Regarding plaintiff's claims for damages, plaintiff is prevented from relitigating the constitutionality of the system Tulsa City-County Jail uses to provide inmates access to the courts, legal materials, and counsel, by the doctrine of collateral estoppel. Crowder v. Lash, 687 F.2d 996, 1009 (7th Cir. 1982). Since plaintiff has not alleged that his interests were inadequately represented by the class representative, his claims are without merit and should be dismissed. Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978).

Since a review of the complaints filed originally as 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C, does not indicate that plaintiff can make a rational argument on the law or the facts sufficient to bring his claims within the ambit of a §1983 action, it is the order of this court that the above actions be dismissed, pursuant to this court's review under 28 U.S.C. §1915(d). Furthermore, the remaining defendants in the actions originally filed as 86-C-803-B and in Counts II and III of 86-C-804-C are hereby given an additional twenty (20) days from this date to file answers or otherwise plead to plaintiff's complaints.

Dated this 1st day of July, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ADAM WAYNE STERLING, Plaintiff, v. JAY DEAN DALTON, a/k/a J. DALTON, a/k/a JAY DALTON, CLIFFORD HOPPER, Both Tulsa Co. Dist. Judges, and FRANK THURMAN, SHERIFF, Tulsa, County, Okla., Defendants.	)	86-C-763-B

FILED

ADAM WAYNE STERLING, Plaintiff, v. JOHN DOE, Commissioner/ Director, State of Oklahoma Department of Health, Defendant.	)	86-C-800-B

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ORDER

This action is a consolidation of seven separate civil rights complaints instituted by the plaintiff, Adam Wayne Sterling, pursuant to 42 U.S.C. §1983. In each of the seven individual actions, a Motion for Leave to Proceed In Forma Pauperis was filed at the outset and granted by the court. Several summons have been served. A special report was ordered by the court and was filed April 7, 1987, along with the Answers of defendants Jay Dalton, Clifford Hopper, and Frank Thurman.

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A complaint is "frivolous" as that term is used in §1915(d) when the plaintiff cannot make a rational argument on the law or the facts to support his claim. Henriksen, supra, at 853. Applying this test to Mr. Sterling's complaints, the court finds that all of former Case Nos. 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C should be dismissed as frivolous for the following reasons.

A. Case No. 86-C-763-B

In Counts II and III of plaintiff's original complaint under Case No. 86-C-763-B, it appears to the court that plaintiff's allegations are directed toward defendant Jay Dalton (a District Judge of the District Court of Tulsa County, Oklahoma). Although not altogether clear, the allegations apparently concern the

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In plaintiff's complaint originally filed under Case No. 86-C-800-C, plaintiff alleges in Count I that an unnamed "commissioner/ director" refused to amend plaintiff's birth certificate to reflect plaintiff's "common law name change". Assuming the plaintiff is referring to the Director of Oklahoma's

Department of Health as set forth in the style of the complaint, this court knows of no right embodied in the United States Constitution protecting plaintiff's desire to have his name change reflected in the State's birth records, absent plaintiff's prior resort to Oklahoma's statutory procedure for name changes, found at Title 12 O.S. §§1631-40 (1986). Plaintiff's complaint against the Director must be dismissed as being without merit for the reason that plaintiff cannot make a rational argument on the law or these facts stating a claim cognizable under §1983.

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In the complaint originally filed under Case No. 86-C-804-C, plaintiff alleges in Count I that "food available or procured apparently is not reaching [the] prison population." Even construed liberally, plaintiff has not made a claim or alleged facts in Count I sufficient to raise a constitutional claim of cruel and unusual punishment (Ramos v. Lamb, 639 F.2d 559, 571 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981)). Therefore, plaintiff's claim must be dismissed as without merit.

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Dated this 1st day of Sept, 1987.

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UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FLINT RESOURCES COMPANY, FLINT CONSTRUCTION COMPANY OF SOUTH AMERICA, INC., KELLEY RANCH COMPANY, and ASHLEY ENTERPRISES, INC.,	)	
Plaintiffs,	)	
vs.	)	No. 87-C-658 B
STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION,	)	
Defendant.	)	

DISMISSAL WITHOUT PREJUDICE

Plaintiffs, FLINT RESOURCES COMPANY, FLINT CONSTRUCTION COMPANY OF SOUTH AMERICA, INC., KELLEY RANCH COMPANY and ASHLEY ENTERPRISES, INC., pursuant to Fed.R.Civ.P. 41 (a) (1), dismiss the above-captioned action without prejudice.

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By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 1987, I mailed a true and correct copy of the above and foregoing Dismissal to the following with proper postage thereon:

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ADAM WAYNE STERLING, Plaintiff, v. JAY DEAN DALTON, a/k/a J. DALTON, a/k/a JAY DALTON, CLIFFORD HOPPER, Both Tulsa Co. Dist. Judges, and FRANK THURMAN, SHERIFF, Tulsa, County, Okla., Defendants.	)	86-C-763-B

FILED

ADAM WAYNE STERLING, Plaintiff, v. JOHN DOE, Commissioner/ Director, State of Oklahoma Department of Health, Defendant.	)	86-C-800-B

ADAM WAYNE STERLING, Plaintiff, v. UNITED STATES OF AMERICA, [U.S.D.C./No. Dist. Ok], Defendant.	)	86-C-801-B

ADAM WAYNE STERLING, Plaintiff, v. FRANK THURMAN, SHERIFF, TULSA COUNTY; JOHN DOE, WARDEN, TULSA CITY-COUNTY JAIL; CITY OF TULSA; COUNTY OF TULSA; JOHN/JANE DOE, REGISTERED AGENT; SOUTHWESTERN BELL TELEPHONE COMPANY, Defendants.	)	86-C-803-B

ADAM WAYNE STERLING, Plaintiff, v. GEORGE GRIGSBY, FRANK THURMAN, THREE JOHN DOES, ONE COUNTY COMMISSIONER, THREE JOHN DOES, CITY OF TULSA, Defendants.	)	86-C-804-B

ADAM WAYNE STERLING, Plaintiff, v. JOHN PILANT, FRANK THURMAN, & JOHN DOE a/k/a "DR. LOVE", AND CITY OF TULSA, OKLAHOMA & COUNTY OF TULSA COUNTY, OKLAHOMA, Defendants.	)	86-C-805-B

ADAM WAYNE STERLING, Plaintiff, v. CITY OF TULSA, (various John/Jane Does); COUNTY OF TULSA, (various John/Jane Does); FRANK THURMAN, Defendants.	)	86-C-806-B Consolidated

ORDER

This action is a consolidation of seven separate civil rights complaints instituted by the plaintiff, Adam Wayne Sterling, pursuant to 42 U.S.C. §1983. In each of the seven individual actions, a Motion for Leave to Proceed In Forma Pauperis was filed at the outset and granted by the court. Several summons have been served. A special report was ordered by the court and was filed April 7, 1987, along with the Answers of defendants Jay Dalton, Clifford Hopper, and Frank Thurman.

To ensure that the privilege of proceeding in forma pauperis is not abused, Congress authorized dismissal of an in forma pauperis proceeding where the court finds an action is frivolous or malicious. Title 28 U.S.C. §1915(d); Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981). If the frivolousness of the complaint is not facially apparent, it is incumbent upon the court to develop the case and to sift the claims and known facts thoroughly until completely satisfied either of its merit or lack of merit. Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986).

One method approved by the Tenth Circuit for developing the record is the special report. Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). Because there are compelling reasons for allowing courts broader dismissal powers in in forma pauperis suits (Jones v. Bales, 58 F.R.D. 453, 463 (N.D.Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973)[1], dismissal under §1915(d) is appropriate whenever it becomes clear that an in forma pauperis complaint is without merit. Cay, supra, at 324.

A complaint is "frivolous" as that term is used in §1915(d) when the plaintiff cannot make a rational argument on the law or the facts to support his claim. Henriksen, supra, at 853. Applying this test to Mr. Sterling's complaints, the court finds that all of former Case Nos. 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C should be dismissed as frivolous for the following reasons.

A. Case No. 86-C-763-B

In Counts II and III of plaintiff's original complaint under Case No. 86-C-763-B, it appears to the court that plaintiff's allegations are directed toward defendant Jay Dalton (a District Judge of the District Court of Tulsa County, Oklahoma). Although not altogether clear, the allegations apparently concern the

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1 Persons proceeding in forma pauperis are immune from imposition of costs, and practically immune from later tort actions for "malicious prosecution"; in forma pauperis plaintiffs approach the courts with nothing to lose and everything to gain, if nothing more than a short sabbatical in the nearest federal courthouse; the temptation to file complaints that contain facts that cannot be proven is obviously stronger in such a situation.

manner in which Judge Dalton handled various aspects of plaintiff's state criminal trial, and the suppression of evidence by Judge Dalton and/or Tulsa County District Court Judge Clifford Hopper. As such, plaintiff's complaint is totally without merit in the context of a civil rights action. It has been well settled since 1869 (Randall v. Brigham, 7 Wall. 523) that a judge cannot be held responsible to private parties in civil actions for their judicial acts, however injurious may be those acts, except when they act in clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 357, 98 S.Ct. 1099, 55 L.Ed.2d 331, reh'g denied, 436 U.S. 951, 98 S. Ct. 2862, 56 L.Ed.2d 795 (1978); Van Sickle v. Holloway, 791 F.2d 1431 (10th Cir. 1986). It appearing to this court that the judicial defendants were acting within their jurisdiction, Counts II and III will be dismissed as frivolous. As to Count I, plaintiff makes no claim for relief but merely cites several sections from the United States and Oklahoma Constitutions. Plaintiff also refers to a narrative statement, not of record, in support of Count I. Because Count I also fails the §1915(d) test for frivolousness, it must also be dismissed.

B. Case No. 86-C-800-C

In plaintiff's complaint originally filed under Case No. 86-C-800-C, plaintiff alleges in Count I that an unnamed "commissioner/ director" refused to amend plaintiff's birth certificate to reflect plaintiff's "common law name change". Assuming the plaintiff is referring to the Director of Oklahoma's

Department of Health as set forth in the style of the complaint, this court knows of no right embodied in the United States Constitution protecting plaintiff's desire to have his name change reflected in the State's birth records, absent plaintiff's prior resort to Oklahoma's statutory procedure for name changes, found at Title 12 O.S. §§1631-40 (1986). Plaintiff's complaint against the Director must be dismissed as being without merit for the reason that plaintiff cannot make a rational argument on the law or these facts stating a claim cognizable under §1983.

In Counts II and III plaintiff apparently seeks a declaratory judgment declaring Oklahoma's Name Change Act unconstitutional. However, this court will decline to rule on the constitutionality of a state statute in advance of its application and construction by the state courts, and without reference to some precise set of facts to which it is to be applied. Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). Therefore, Counts II and III will be dismissed.

C. Case No. 86-C-801-E

In plaintiff's complaint originally filed under Case No. 86-C-801-E, plaintiff alleges in Counts II and III that defendant James O. Ellison (United States District Judge, Northern District of Oklahoma) violated plaintiff's rights by denying plaintiff an appeal bond in a federal criminal proceeding (85-CR-123-E). Applying the same doctrine of judicial immunity to plaintiff's allegations against defendant Ellison, plaintiff can make no

rational argument for relief on the law or these facts and for this reason, Counts II and III must be dismissed. Van Sickle, supra, at 1435. In Count I plaintiff fails to allege a constitutional violation by any defendant, named or unnamed, complaining instead in general terms about the Bail Reform Act of 1984. Count I must also be dismissed as frivolous.

D. Case No. 86-C-804-C

In the complaint originally filed under Case No. 86-C-804-C, plaintiff alleges in Count I that "food available or procured apparently is not reaching [the] prison population." Even construed liberally, plaintiff has not made a claim or alleged facts in Count I sufficient to raise a constitutional claim of cruel and unusual punishment (Ramos v. Lamb, 639 F.2d 559, 571 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981)). Therefore, plaintiff's claim must be dismissed as without merit.

In Counts II and III, plaintiff's allegations, construed liberally, make out a viable §1983 claim against defendants George Grigsby, Frank Thurman, and the Tulsa County Commissioners. However, it appearing to the court that the City of Tulsa does not supervise the Tulsa City-County Jail (See, Affidavit of David L. Pauling, Assistant City Attorney, filed October 28, 1986), plaintiff's claims against the City of Tulsa Commissioners should be dismissed as frivolous both in this complaint, and in the complaint originally filed as Case No.

86-C-803-B (alleging denial of telephonic access to the courts, counsel, and family while incarcerated in the Tulsa City-County Jail).

E. Case No. 86-C-805-E

In the complaint originally filed under Case No. 86-C-805-E, Counts I, II, and III contain little more than general allegations of inadequate dental care provided for the general inmate population within the Tulsa City-County Jail system. Plaintiff does not, however, allege personal harm or deprivation. Furthermore, none of the allegations of harm or deprivation appears facially to rise to the level of a constitutional violation. Thus, Counts I, II, and III should be dismissed as without merit.

F. Case No. 86-C-806-B

In plaintiff's last complaint, originally filed under Case No. 86-C-806-B, plaintiff attacks the constitutionality of the Tulsa City-County Jail system's provision for access to the courts, legal materials, and counsel. In Clayton v. Thurman, Case No. 79-C-723-B, this court determined that the Tulsa City-County Jail complies with constitutional standards regarding access to courts, legal materials, and counsel. Plaintiff is a member of the plaintiffs certified as a class in Clayton. Consequently, plaintiff's claims in Case No. 86-C-806-B, insofar as they seek declaratory and injunctive relief, are barred by the application of res judicata.

Regarding plaintiff's claims for damages, plaintiff is prevented from relitigating the constitutionality of the system Tulsa City-County Jail uses to provide inmates access to the courts, legal materials, and counsel, by the doctrine of collateral estoppel. Crowder v. Lash, 687 F.2d 996, 1009 (7th Cir. 1982). Since plaintiff has not alleged that his interests were inadequately represented by the class representative, his claims are without merit and should be dismissed. Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978).

Since a review of the complaints filed originally as 86-C-763-B, 86-C-800-C, 86-C-801-E, 86-C-805-E, 86-C-806-B, and Count I of 86-C-804-C, does not indicate that plaintiff can make a rational argument on the law or the facts sufficient to bring his claims within the ambit of a §1983 action, it is the order of this court that the above actions be dismissed, pursuant to this court's review under 28 U.S.C. §1915(d). Furthermore, the remaining defendants in the actions originally filed as 86-C-803-B and in Counts II and III of 86-C-804-C are hereby given an additional twenty (20) days from this date to file answers or otherwise plead to plaintiff's complaints.

Dated this 15th day of July, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE